Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

In re Estate of Solomon Brown

Michelle D. Smith

Petitioner

v.

Homer Brown (as self and P.R. for Estate Auldrey Glover)
And Lorenzo Randle, Personal Representative of the Estate of Mary James

Respondents

On Petition For Writ of Certiorari
To The District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Michelle D. Smith, Esq. Pro Se
Homeowners Legal Counsel, PLLC
433 Kennedy St. N.W. Suite 2
Washington, D.C. 20011

QUESTIONS PRESENTED FOR REVIEW

FACTS: The personal representative hired her lawyer's real estate company to sell property in the estate. The personal representative obtained an appraisal that said the property was worth $258,000[1]. The property was listed for $258,000 and sold for $300,000[2]. Two of the heirs objected to the sale on the grounds that it was not sold for enough money. The trial court ruled that the personal representative[3] was negligent for using a one year old appraisal and her attorney had a conflict of interest pursuant to Professional Rules of Conduct 1.8. At the time the code only required an appraisal at the date of death.

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[1] Memorandum and Order dated February 22, 2004 page 5
[2] Memorandum and Order dated February 22, 2004 page 6
[3] Memorandum and Order dated February 22, 2004 page 15-16.

1. Whether due process[4] was violated when a person with both a license to practice law and a license to practice real estate who was charge with having a conflict of interest for a real estate sales transaction made pursuant to a listing agreement was held to have violated the conflict of interest rules for lawyers under the Professional Rules of Conduct 1.8? Did the Court error by applying the conflict of interest rules for lawyers and not those of realtors?

2. Whether a violation of Due Process and the Equal Protection Clause[5] occurred when the Court of Appeals defined a realtor engaged in selling real estate as a lawyer doing business pursuant to Professional Rules of

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[4] 14th Amendment section 1
[5] 14th Amendment section 1

Conduct 1.8 because that person also has a law license? The issue to be determined is whether the professional practice and procedural standards for realtors should be applied to a dual professional (attorney/broker) while conducting a real estate transaction or should the professional practice and procedural standards for a lawyers apply? Is it a violation of the Equal Protection Clause and Due Process Clause[6] for that person to be treated as a lawyer and to be held to that standard regardless of the transaction they are engaging in even if that other transaction is pursuant to another licensed profession?

3. Whether the lower court violated the 14th Amendment section 1 of the United States Constitution by holding Petitioner to a different standard for selling real estate by

[6] 14th Amendment section 1

virtue of the fact that Petitioner also held a law license? For instance, if there would be no violation of the rules of ethics or professional responsibility for an ordinary realtor to list a house for one price and sell the house for higher than the listing price, is it a Constitutional violation to rule that said realtor had an obligation to obtain a price greater than or equal to an appraisal that had not been made, never presented to said realtor, nor required by the probate court or the standards of real estate practice simply because that individual also holds a law license.

4. Whether the Court violated Due Process and the Equal Protection[7] clause by giving Respondents standing to assert a violation of the Professional Rules of Conduct 1.8(which is under the heading attorney client

[7] 14th Amendment section 1

privilege) under the allegation that Petitioner did not give her own client an opportunity to speak to legal Counsel before signing a listing a agreement with Petitioner when Petitioner's client gave no indication that she was dissatisfied with Petitioner's services and Petitioner did not represent the Respondents?

5. Whether the Due Process Clause and Equal Protection Clause[8] was violated when at a hearing in which the Court directed the parties that the Respondent had the burden of proof to find Petitioner had a conflict of interest he rule against the Petitioner on an allegation that was not raised in the pleadings nor even mentioned at trial and could reasonably have been construed by the Petitioner as not being an

[8] 14th Amendment section 1

element of trial because more than one conflict of interest rules applied to the situation?

6. Whether there was a violation of the Equal Protection Clause and Due Process[9] Clause when the Court gave Respondents standing to assert that a real estate transaction was adverse based upon Professional Rule of Conduct 1.8 [10]because Petitioner who was a broker also had a law license, when otherwise said transaction could not be so challenged if it were conducted by another real estate company.[11]

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[9] 14th Amendement section 1

[10] Needham v. Hamilton, 459 A. 2d 1060, 1061 (D.C. 1983(The obligation of an attorney is to his client and not to third parties)

[11] Richardson v. Green, 528 A. 2d 429, 430(D.C. 1987) Legal title in all property vests in the personal representative. Intestate heirs do not hold legal title to estate property and Douglas v. Lyles, 841 A. 2d 1,3, 2004 D.C. App. Lexis 6,6

7. Whether there is a violation of the Due Process Clause and the Equal Protection Act [12]if the Court in applying Professional Rules of Conduct 1.8 against attorney/broker when signing listing agreement with client treats notice in listing agreement advising client to seek legal counsel before signing the agreement as inadequate notice to satisfy rule 1.8?

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[12] 14th Amendement section 1

LIST OF PARTIES

All the parties in the case appear in the caption.

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2. Appendix B - In re Solomon Brown 940 A. 2d 249 (2007); case number

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3

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In the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue for judgment

below:

Opinions Below

1. The opinion of the highest state court to review this opinion is in Appendix and B and it is reported in In re Solomon Brown, 940 A. 2d 249 (2007).

2. The opinion of the trial court is in Appendix C and D. It has not been published.

JURISDICTION

Jurisdiction is granted based upon 28 USC 1257(a). It is sought based upon Supreme Court rule 10 for violation of the due process clause and equal protection provision of the 14th Amendment section 1 of the U.S. Constitution. The District of Columbia Court of Appeals reversed the trial court's decision in part and ruled that Petitioner was entitled to her commission as broker but still had a conflict of interest on August 23, 2007. A Motion for Reconsideration was filed by the Petitioner and said motion was denied on October 3, 2007.

Certiorari is granted only in case involving principles the settlement of which is of importance to public as distinguished from parties, and in cases where there is real and embarrassing conflict of

opinion and authority between courts of appeals. NLRB v. Pittsburg S.S. Co. (1951) 340 US 498, 71 S Ct 453, 95 L Ed 479, 27 BNA LRRM 2382, 19 CCH LC P 66192.

Writ of certiorari will be granted by Supreme Court where at least four members believe that "there are special and important reasons therefore," as required by predecessor to Rule 10. Rich v. Sioux City Memorial Park Cemetery, Inc. (1955) 349 US 70, 99 L Ed 897, 75 S Ct 614. Despite absence of conflicting decision by Court of Appeals of any other circuit, question was important one under predecessor to rule 10 where attention was called to diverse decision in district courts, to many other cases pending in which action was awaiting authoritative settlement of questions presented herein, to large amounts of money involved, and to

number of persons whose liability would remain uncertain until dispute was finally settled. U.S. v. Constantine (1935) 296 US 287, 56 S Ct 223, 80 L Ed 233, 35-2 USTC 9655, 361 USTC P 9009, 16 Aftr 1137 (ovrid on other grounds as stated in US v. Smith (1952,SD Cal) 106 F. Supp. 9 42 AfTR 437). "Special and important reasons" which would justify grant of writ of certiorari by Supreme Court under predecessor to Rule 10 implied a problem beyond academic or episodic; this was especially true where issues involved reached constitutional dimension, for then there came into play regard for Court's duty to avoid decision of constitutional issues unless avoidance became evasion. Rice v. Sioux City Memorial Park Cemetery, Inc. (1955) 349 US 70, 99 L Ed 897, 75 S Ct 614.

CONSTITUTIONAL PROVISONS

USCS Const. Amendment 14 section 1 (Citizens of the United States

All persons born or naturalized in the U.S. and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS § 1257
§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute

of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

District of Columbia Rules of Professional Conduct 1.8 (a) (effective January 1, 1991 to January 31, 2007)

A lawyer shall not knowingly enter into a business transaction with a client or knowingly

acquire an ownership, possessory, security or pecuniary interest adverse to the client unless:

(a) the transaction and terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be easily understood b the client.

(b) the client is given a reasonable opportunity to seek independent counsel in the transaction and

(c) thc client consents in writing thereto.

Model Rule 1.8 (a) states:

(a) a lawyer shall not enter into a business transaction with a client or knowingly acquire an

ownership, possessory, security or other pecuniary interest adverse to the client unless:

(b) (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and

(c) transmitted in writing in a manner that can be reasonably understood by the client;

(d) (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advise of independent

(e)

legal counsel on the transaction and

(f) (3) the client give informed consent, in writing signed by the client, the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is

(g) representing the client in the transaction.

D.C. Code § 20-712 (1993)

§ 20-712. Appraisal; general

(a) The fair market value of each item listed in the inventory, as of the date of death of the decedent, shall be determined by an appraisal. Except as specifically provided by this subsection,

the personal representative shall use the standing appraisers or, for good cause shown, special appraisers. The personal representative may appraise the following items listed in section 20-711 (a):

(1) items listed in paragraphs (4), (5), and (6); and (2) items listed in paragraph (3) that are listed on any national or regional exchange or are sold in the over-the-counter market for which bid and asked prices are regularly published.

(b) An appraisal shall be in columnar form, shall describe generally each item that has been appraised, shall assign a value to each item that has been appraised, and shall be verified by the

appraiser. A verification under this section shall certify that the appraiser has impartially valued the property described in the appraisal to the best of the appraiser's skill and judgment. Any appraisal not performed by the personal representative shall be delivered to the personal representative immediately upon completion and verification. The name and address of any appraiser shall be indicated on the inventory with the item or items appraised.

(c) An appraisal fee shall be payable only to a person making an appraisal at the request of the personal representative.

STATEMENT OF THE CASE

A hearing was held initiated by the Personal Representative for the Estate of Solomon Brown's Motion to Ratify a Contract of Sale[1] and Personal Representative's Request for Compensation[2]. At trial, Petitioner asked the Court to present her case first. The trial court denied Petitioner's request to present her case first even though the hearing was brought pursuant to her client's motions[3].

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[1] Memorandum and Order of trial court date February 22, 2006 page 1- Appendix D-1.

[2] Decision of the Court of Appeals dated August 23, 2007 page 18 – Appendix B-40;
Memorandum and Order of trial court date February 22, 2006 page 1- Appendix D-1;

[3] Trial transcript dated September 24, 2004 page 25 line 14-20- Appendix E.

The court instructed the parties that the issues that they were to present at a hearing on the matter were 1) "What was the market value of the estate property at the time of sale[4] 2) the Court advised the parties and to get an appraisal of the value of the Estate property at the time of sale even though Petitioner advised that Court that the code only required the Personal Representative to have an appraisal at the date of death[5] and 3) the Court instructed the parties to present evidence on whether or not the counsel for the personal representative had a conflict of interest by being both the broker/owner of the company that the personal representative used to sell the estate

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[4] Decision of the Court of Appeals dated August 23, 2007 page 18- Appendix B-40;

Memorandum and Order dated February 22, 2006 page 3- Appendix D 12 item number 25.

[5] September 24, 2004 transcript page 13- Appendix E-3.

property.[6] When rendering a decision, the court re-frased the issue to whether under the circumstances it was reasonable for the Personal Representative to offer for sale the property on the basis of an appraisal that was more than a year old.[7]

D.C. Code section, 20-712 (1993) indicates that the personal representative had a duty to obtain an appraisal as of the date of death. Petitioner objected to the Court's instructions and informed the Court of it's inaccuracy.[8]

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[6] Decision of the Court of Appeals dated August 23, 2007 page 18- Appendix B-40.

[7] Memorandum and Order dated February 22, 2006 page 8- Appendix D 12-13 item #26.

[8] Transcript September 24, 2004 page 11 line 8-25 and page 12 line 1-24- Appendix E-1-2.

The Court did not mention the conflict of interest rules he was referring to . The Court also directed the parties that the burden of proof was on the Respondents.[9] At trial the Respondents did not present any evidence at trial about Petitioner having a conflict of interest[10], nor did they assert any allegation or any elements that Petitioner violated Professional Rules of Ethics 1.8 nor did they assert the claim that Petitioner violated rule 1.8 by not affording her own client the opportunity to have independent counsel before Petitioner's client signed the listing agreement with Petitioner.[11]

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[9] Transcript dated September 24, 2004 page 25 line 14-20; Memorandum and Order dated February 22, 2006 page 8; Court of Appeals decision dated August 23, 2007 dissent of Judge Thompson footnote number 2- Appendix B 41

[10] Appeals decision dated August 23, 2006 dissent of Judge Thompson page 18 mentioned after footnote number 2 – Appendix B-41-42.

[11] Appeals decision dated August 23, 2006 dissent of Judge Thompson page 19 - Appendix B.

In Judge Thompson's dissent, she said, "The siblings put on expert and lay testimony about the reasonableness of the sales price, but presented no evidence on conflict of interest.

More particularly, none of the witnesses mentioned Rule 1.8 (a) or

testified about its requirements or whether they were satisfied. No witness testified that the terms of the listing agreement --- a Greater Capital Area Association of Realtors, Inc."Exclusive Right to Sell- Listing for Improved Real Property' agreement specifying a six –month exclusive right to sell and a 3% broker fee ----were unfair or unreasonable. There was no evidence that Smith denied Glover the

opportunity to consult with independent counsel. There was no evidence that Glover did not understand the (uncomplicated) terms that were set out expressly in the listing agreement that she signed, or did not understand that Smith had an interest in the real estate brokerage company. The listing agreement states, as the only 'Additional Term," that "Seller does not want agent to enter listing on MLS.' There was no evidence that this approach was suggested to Glover or foisted upon her by Smith. There was no evidence that Glover –who the record discloses, was a GS-11 personnel management specialist was incompetent. There was no evidence

that Glover was dissatisfied with Smith's services."[12]

During closing arguments, Petitioner argued before the court the conflict of interest rules of brokers[13] since the transaction that was at issue was the sales price of a real estate transaction involving the listing agreement. Petitioner also argued that her role as attorney and broker were not in conflict because she only represented one person both as an attorney and as broker her fiduciary duty was to the same party since the agent only represented the seller.[14] Petitioner did not argue the elements of rule

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[12] Decision of the Court of Appeals dated August 23, 2007 dissent of Judge Thompson page 18-19- Appendix B-41-43.

[13] Decision of the Court of Appeals dated August 23, 2007 dissent of Judge Thompson page 19 – Appendix B-43-44

and page 8 of the opinion of Judge Farrell – Appendix B-17-18.

[14] Decision of the Court of Appeals dated August 23, 2007 page 8 – Appendix B-17-18.

1.8[15] because neither the Court nor the Respondents specifically alleged a violation of rule 1.8. Furthermore, in Petitioner's mind, she did not perceive herself as an attorney doing a business transaction with respect to the listing agreement but rather a licensed broker and believed that she was to argue the conflict of interest rules for brokers. Furthermore, rule 1.8 is under the heading attorney client relationship in Chapter 1 of the Professional Rules of Responsibility dated (1991-2007) and since Petitioner knew that her client did not have a problem with her services she could not foresee how anyone else could raise the elements of rule 1.8 without her client's participation.[16]

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[15] Decision of the Court of Appeals dated August 23, 2007 page 6- Appendix B 13-14

[16] Affidavit of Auldrey Glover in Reply to Opposition to Petition to Court for Approval of the Sale of the Real Property exhibit 1- Appendix F

At the conclusion of the hearing the Court ruled that Petitioner had a conflict of interest in the real estate transaction. The court said, "The conflict of interest arises because if Auldrey Glover had an independent attorney she would have been told that the concession of a commission to 3% was of no benefit to the estate unless the property were marketed properly. Paying 6% on a higher sales price nets the estate more than a 3% commission on a price made lower through poor marketing. [17]

Had the Respondent or the Court identified with greater specificity the elements of the conflict that they perceived Petitioner to have violated prior to trial or during trial, Petitioner could have shown with greater specificity elements that showed no violation that were already on record. For instance

[17] Memorandum Order dated Feb. 22, 2006 page 16- Appendix D-27-28 item #5.

with regard to the allegation that Auldrey Glover had no independent attorney, the standard Greater Capital Association of Realtor's listing agreement signed by the client and admitted as evidence did in fact have a clause which advised client to obtain legal advise before signing the document.[18] With regard to the element that the transaction and terms were fair, the Petitioner could have brought her client to testify to an affidavit signed in the pleadings which indicated that the client was happy and satisfied with the results of the sales transaction because she obtained a price $42,000 greater than her appraisal.[19] And with regard to the elements that the lawyer acquired an interest of the client, Petitioner could have shown the real estate contract, listing agreement, and HUD -1 which all showed that

[18] Listing agreement page 4- Appendix G p.20 item B.
[19] Affidavit of Auldrey Glover from Reply to Opposition to Petition to Court for Approval of sale of real property Exhibit 1- Appendix F.

she did not receive any interest in the client's property, but rather received a fee for providing a buyer. However the Respondents never raised the allegation at trial that they believed that Petitioner's client was in need of independent counsel before signing the listing agreement. [20]

The Court of Appeals was the first party to mention with specificity rule. 1.8 and subsequently ruled that Petitioner had the burden of proof[21] even though the trial court said the Respondents had the burden of proof[22] and instructed Petitioner to

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[20] Decision of the Court of Appeals date August 23, 2007 page 18- 19- Appendix B 41-43.

[21] Decision of the Court of Appeals dated August 23, 2007 page 8- Appendix B-17-19.

[22] Transcript dated September 24, 2004 page 25 line 14-20; Memorandum and Order dated February 22, 2006 page 8- Appendix D point #25; Court of Appeals decision dated August 23, 2007 dissent of Judge Thompson footnote number 2- Appendix B-41.

present her case in response to the Respondents allegations of which there were none.

REASON FOR GRANTING PETITION FOR CERTIOARI

This decision sets a dangerous precedent for practitioners in the legal profession who have more than one professional license. The problem is that the Courts and the bar have a tendency to be over reaching of their authority with regard to acts done under a different license. The Courts and the bar are requiring dual professionals to adhere to the standards of practice governed by the legal profession when in fact they are not practicing law. The Courts and the bar are treating licensed professionals as if they are lawyers doing business when in fact they are practicing

under another license and as such, the boards of the alternate profession should be the one to oversee actions done by the dual professional under that license. In addition these are transactions no other lawyer by virtue of his law license would be able to do, therefore, they are not lawyers doing business. They are realtors or insurance people, or doctors etc performing under a different license. The equal protection clause is being violated when another company practicing under the same license as the dual professional could engage in the exact same transaction as that of the dual professional and not undergo any scrutiny or even raise an eye brown. Equal protection clause and due process is also violated if standing is given to persons who would otherwise have no standing to challenge the same transaction had the transaction been

done by a person without a dual license but the court grants standing to them because the person conducting the transaction has a dual license. The equal protection clause and due process clauses are being violated if in order to successfully charge a similar company without a dual license holder, the court would have to produce expert witnesses in the same field to testify as to the appropriate standards of care for said profession and whether or not those standards of care have been violated, but for the dual professional they do not. The danger of the bar and the Court, holding the dual professional to the standards of a lawyer, is their ignorance about the procedures and standards of the second profession. Thus it is causing them to hold the dual professional to unreasonable or

inaccurate standards not required by their peers in the non-legal profession. In addition, due process is violated if the court gives the burden of proof on poorly articulated charges which neither set out the code section of the violation nor the elements the persons believe the party charged has violated. This practice potentially sets every dual professional up for failure as that person may be privy to two sets of rules. For instance both lawyers and realtors have " conflict of interest" rules in which the elements are different.

It is also over- reaching and improper to consider the dual professional to be a lawyer doing business when actions that are done pursuant to the second license would not be permissible for another lawyer. For instance,

lawyers are not permitted under the laws to sell real estate for a commission. Selling real estate for a commission is an act only licensed to realtors is allowed to do. It would be improper for the court to try a realtor using the standards for lawyers. It is just as improper for the Court to try a dual professional for acts done under a real estate sales license using the standards for lawyers. Such a practice by the Courts and the bar violates the Equal Protection Clause, because it causes the dual professional to be held to a more arduous and unreasonable standards not

adhered to by others in his profession that do not have a law license.

A professional license has strict standards that each professional must adhere to in their practice. The appropriate persons to discuss those standards in trial are expert in the same field of the non-legal license. It is also important that the charges be clearly enumerated and the elements of each charge laid out so the individual may properly defend themselves.

CONCLUSION

Wherefore, these and any other reasons that may be apparent to the Court, the Petitioner requests this Honorable Court grant her Writ of Certiorari.

Respectfully Submitted,

Michelle D. Smith, Esq. #445825
Pro-Se Petitioner
Homeowners Legal Counsel, PLLC
433 Kennedy St. N.W. Suite 2
Washington, D.C. 20011
(202) 328-6002

CERTIFICATE OF SERVICE

Affidavit of Service

I hereby certify under penalty of perjury that a copy of the forgoing Writ of Certiorari was mailed by certified mail on this _____ day of _____, 2007 to the following: Nicholas Ward, Esq., Counsel for the Respondent Homer Brown and the personal representative of the Estate of Auldrey Glover at 1212 New York Ave., N.W. Suite 1000, Washington, DC. 20005-6127 and Lorenzo Randle, Esq. Personal Representative for the Estate of Mary James at 6811 Kenilworth Ave. suite 210, Riverdale, MD 20737

_____

Subscribed and sworn before me on this _____day of _____, 2007

_____

Notary My commission expires:

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Writ of Certiorari complies with the word count requirement. This Petition contains _____number of words.

Michelle D. Smith

Appendix A

District of Columbia
Court of Appeals

No. 06-PR-435

IN RE: ESTATE OF SOLOMON BROWN

FILED: OCT. 3, 2007

MICHELLE D. SMITH,

Appellant.

ADM1374-03

BEFORE: Farrell, Reid and Thompson, Associate Judges.

O R D E R

On consideration of appellant's *pro se* motion for reconsideration, it is ORDERED that the motion for reconsideration is denied.

PER CURIAM

Associate Judge Thompson would grant the motion.

Copies to:

Honorable Jose M. Lopez

Michelle D. Smith, Esquire
Homeowners Legal Counsel, PLLC

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FILED

OCTOBER 3, 2007

DISTRICT OF COLUMBIA

COURT OF APPEALS

Appendix B

IN RE ESTATE OF SOLOMAN BROWN,
MICHELLE D. SMITH, APPELLANT.

No. 06-PR-435

DISTRICT OF COLUMBIA COURT OF APPEALS

930 A.2d 249; 2007 D.C. App. LEXIS 553

June 26, 2007, Argued
August 23, 2007, Decided

Appeal from the Superior Court of the District of Columbia. (ADM-1374-03). (Hon. Jose M. Lopez, Trial Judge).

COUNSEL: Michelle D. Smith, Pro se.

Nicholas D. Ward, with whom Lorenzo Randle was on the brief, for the objecting heirs.

JUDGES: Before FARRELL, REID, and THOMPSON, Associate Judges. Opinion for the court by Associate Judge FARRELL. Concurring opinion by Associate Judge REID. Dissenting opinion by Associate Judge THOMPSON.

OPINION BY: FARRELL

FARRELL, *Associate Judge*: This appeal

presents two questions. First, did the probate judge correctly find that appellant Michelle D. Smith had a conflict of interest when she simultaneously served as attorney to the personal representative of a decedent's estate and contracted with the latter to sell real property of the estate using Smith's services as sole owner of a real estate brokerage company? Second, having found a conflict of interest, did the judge have "equitable" authority to order the attorney to disgorge the realtor's commission she--or her company--had earned from the sale and return it to the estate? We answer the first question "yes," the second "no." Although the judge had undeniable authority to consider any conflict of interest on Smith's part (a) in

reviewing the personal representative's conduct in effecting the sale through her, and (b) in assessing the reasonableness of the attorney's fee request made on Smith's behalf, no statutory authority enabled the judge to reach past the personal representative, as it were, and order a third-party contractor, including an attorney, to disgorge funds based on a conflict of interest in performing duties owed solely to the personal representative.

I.

Solomon Brown died intestate leaving eleven heirs and one main estate asset, a townhouse on 15th Street, N.W. In 2003, one

of his daughters, Auldrey Glover (Glover), was appointed unsupervised personal representative of the estate. Attorney Smith was retained by Glover to represent her in the estate administration. Smith was also a licensed real estate broker and sole owner of Smart Choice Real Estate, PLLC (Smart Choice).

Intending to sell the townhouse, Glover had received an October 2002 appraisal valuing the house at $ 258,000. In October 2003, Glover and Smith agreed in writing that Smart Choice would list and market the townhouse under an arrangement that would earn Smart Choice a (below-market) 3% commission in return for an exclusive listing, *i.e.*, the property

would not be entered in the Multiple Listing Service (MLS). Less than two months later, the townhouse was sold to a couple, the Chens, for $ 300,000, Smith thereby earning a $ 9,000 sales commission. As it happened, the Chens again listed the property for sale in March 2004 for $ 599,000, and sold it a few days later for $ 730,000.

Glover, as personal representative, had not received consent to the sale of the property from the other heirs before the townhouse was sold. In May 2004, she filed a Petition to Court for Approval of the Sale of the Real Property, at the same time filing her First and Final Account of the estate. That same month, she filed the Personal Representative's Request for Compensation

in the amount of $ 6,250 for herself and $ 9,692.72 for legal services performed by Smith. Thereafter, all but two heirs consented to the sale of the townhouse and did not object to the account or the request for compensation. In June 2004, however, a son and the estate of a daughter of the decedent filed objections in the Probate Division to the sale of the property, the accounting, and the request for compensation, alleging that the townhouse had been sold without their knowledge by Smith and for a price based on an appraisal more than one year old. The objections asked for a hearing, *inter alia*, "to find out why [Smith] did not disclose her connection to Smart Choice ... and why [Glover was

seeking] to ratify a sales contract for a consideration far below the market and have the heirs ... pay her for this activity." In reply, Smith made the listing agreement part of the record and asserted both that Smart Choice was "a separate legal entity from Michelle D. Smith's legal practice" and that her "relationship with Smart Choice was disclosed to the personal representative and was indicated in the listing agreement."

The probate judge held a status hearing in September 2004 and identified the issues for trial as whether "the personal representative acted [reasonably in selling the townhouse for $ 300,000] considering the market conditions," and whether, "as to the

sales commission, ... there was a conflict of interest" on Smith's part by virtue of the sale having been conducted through her real estate company. At a trial in late 2004 and early 2005, lengthy testimony was presented regarding the market value of the townhouse during the relevant time period, the main issue being whether--as the objectors argued--Glover had been negligent or even reckless in letting the property be sold for well below its actual value. But Smith also acknowledged that the judge was being asked to decide "whether there was a conflict of interest[,] with counsel for Ms. Glover being the owner of the company that did the real estate transactions." Although Glover was available to testify, Smith did not call

her or anyone else as a witness regarding the circumstances of her listing agreement with Glover.

In February 2006, the judge issued an order finding that Glover had breached her duty as personal representative by not marketing the property in a prudent manner, including her use of a year-old appraisal and forgoing use of the multiple listing service. He ordered Glover to repay $ 75,000 to the estate, "the difference between the price she obtained for the property and the reasonable market value" shown by the appraisal testimony, "that is[,] $ 75,000."

Glover took no appeal from that ruling. [1]

> The judge further found that Smith's "behavior and action" as attorney to the personal representative was marked by a conflict of interest between her roles as attorney and realtor.

Auldrey Glover used a broker ... [who] was her own lawyer. ... The conflict of interest arises because if ... Glover had had an independent attorney she would have been told that the concession of commission to 3% [in the listing agreement] was of no benefit to the estate unless the property was to be marketed properly.

The judge thus concluded that an "equitable sanction should ... be imposed against Ms. Smith," and

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[1] We were informed at oral argument that she is since deceased.

ordered that "the commission of $ 9,000 to Ms. Smith's company shall be disgorged from her business" and returned to the estate by way of an offset against--a "reduc[tion in]"--the attorney's fees that otherwise "would be due to Ms. Smith." As an additional "sanction," the judge ruled that "the estate shall not be charged for [Glover's] fees and [those] of Ms. Smith regarding all time spent in this litigation."

II.

We first consider whether the probate judge correctly found that Smith had a conflict of interest in simultaneously serving as attorney to the personal representative and contracting with her to sell the estate's townhouse through Smart Choice. [2] The

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[2] The heirs challenge Smith's standing to bring an appeal from sanctions levied chiefly against her client, Glover. But Smith challenges only the order directing her--through Smart Choice--to disgorge the commission from the sale of the townhouse, and it is well settled that "[c]ounsel have

judge was correct in this regard.

As relevant here, Rule 1.8 (a) of the District of Columbia Rules of Professional Conduct (2007) prohibits a lawyer from "enter[ing] into a business transaction with a client" unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

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standing to appeal from orders issued directly against them." *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993); *see also, e.g.*, *Employers Mut. Cas. Co. v. Keene Corp.*, 629 A.2d 581, 582 (D.C. 1993) (proper appeal by attorney from Rule 11 sanctions awarded against both defendant and its attorney).

(3) The client gives informed consent in writing thereto.

There is no question that Smith, the sole owner of Smart Choice, entered into a business transaction with Glover by agreeing to market the townhouse through a listing agreement that would earn her a 3% commission upon sale. We need not dwell separately on whether the terms of the agreement--a reduced commission in return for an exclusive listing--were "fair and reasonable to the client," Rule 1.8 (a)(1), because it is clear that Smith did not meet the other conditions of the rule. [3] At trial, Smith

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[3] Nevertheless, the interrelatedness of at least the first two conditions of Rule 1.8 (a) is suggested by the Comment [4] to the Rule, stating that "[t]he fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client." The Comments to the ethical rules "are intended as guides to interpretation," *see* paragraph [6] to the prefatory section entitled "Scope.")

offered no testimony that she had given Glover, the personal representative, "a reasonable opportunity to seek the advice of independent counsel in the transaction," nor that Glover had "give[n] informed consent in writing thereto" beyond merely signing the listing agreement. As the probate judge recognized, listing the house for sale through Smart Choice was at least potentially disadvantageous to the estate, especially since the listing was an exclusive one that relinquished the potential benefits of an MLS listing. Yet the record is devoid of evidence that Smith (a) had told Glover that she might want to consult independent counsel about whether to enter the listing] transaction, or (b) had

told her anything about the relative advantages and disadvantages of the listing to the estate, so that she could even gauge the utility of seeking independent counsel. In these circumstances, Glover's written signature on the listing agreement cannot constitute the "informed consent in writing" required by Rule 1.8 (a)(3), for "[t]he client's signature on documents [evidencing the business transaction] cannot be considered 'written consent' under [the rule] where the client has not been informed of the implications ... of the transaction." *In re Taylor*, 741 N.E.2d 1239, 1242 n.4 (Ind. 2001).

Smith asserts that the absence of evidence regarding what, if anything, she had told Glover about these matters should not be laid to her account. To the extent this is a claim that she was not on adequate notice of the need to defend her

conduct, the record does not support it. The objecting heirs raised the issue in written opposition both to the petition to ratify the sale of the house and to Glover's claim for attorney's fees on Smith's behalf, and at the status hearing the judge made clear that one trial issue would be whether a conflict of interest on Smith's part tainted the sale by the personal representative. Smith herself acknowledged at the trial that an issue to be decided was whether she had a conflict of interest in "being the owner of the company that did the real estate transactions." She cannot claim ignorance of her obligations as a lawyer under Rule 1.8 (a), nor of the fact that the trial was being held, among other things, to afford her the opportunity to demonstrate that she had no conflict of interest.

Smith relatedly argues that the probate judge heard no "testimony from Ms. Glover or [c]ounsel as to what [c]ounsel advised Ms. Glover" (Reply Br. for Smith at 3). As will be apparent, however, the burden was on Smith to demonstrate compliance with the ethical rule, and Smith offered no reason to the judge--lawyer-client confidentiality or any other--why she could not have shown the substance of her advice to Glover about the listing agreement. As it turned out, testimony by Glover was barely relevant to the defense Smith offered to the conflict alleged: in summation she argued that, because in the *sale of the property* to the Chens she had been broker or listing agent only for the seller, "her ... duty of loyalty [remained always] to" Glover and the estate

("I have the same duty towards her and the estate"), and so "there [was] no conflict of interest." But this ignored the listing agreement, which left the marketing of the townhouse solely to the efforts of Smith and her company with possible disadvantage to the estate, a matter on which Glover was entitled to a reasonable opportunity to seek independent advice.

Rule 1.8 (a) states a prohibition ("[a] lawyer shall not") with an exception ("unless"), and thus by clear implication imposes on the attorney the burden to show that a business transaction he or she entered into with a client entailed no conflict of interest. Interpreting a similarly worded provision, the Supreme Court of Washington has said:

The burden of proving compliance with [Rule] 1.8 rests with the lawyer; an attorney-client transaction is prima facie fraudulent. A lawyer must prove strict

compliance with the safeguards of [Rule] 1.8 (a)[, ... and t]he opportunity to seek independent advice must be real and meaningful.

Valley/50th Avenue, L.L.C. v. Stewart, 159 Wn.2d 736, 153 P.3d 186, 190 (Wash. 2007) (citations and internal quotation marks omitted). The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 126 (2000), setting forth a similar bar to business transactions between a lawyer and client unless conditions corresponding to those in Rule 1.8 (a) are satisfied, likewise states, in Comment a, that "[i]n any civil proceeding between a lawyer and a client or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied." [4] Construing its own parallel ethical rule,

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[4] Even in a disciplinary case, the Restatement observes, "once proof has been introduced that the lawyer entered into a

the California Supreme Court too has recognized that "[w]hen an attorney-client transaction is involved, the attorney bears the burden of showing that the dealings between the parties were fair and reasonable and were fully known and understood by the client." *Hunniecutt v. State Bar*, 44 Cal. 2d 362, 243 Cal. Rptr. 699, 748 P.2d 1161, 1167 (Cal. 1988). Finally, the predecessor to Rule 1.8 (a), DR 5-104 (A), carried with it this Comment in the American Bar Foundation's Annotated Code of Professional Responsibility (1979), at 205 (emphasis added):

DR 5-104 (A) is essentially a restatement of the common law rule that creates a presumption of invalidity concerning business transactions between attorney and client. This presumption is based upon

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business transaction with a client, the burden of persuasion is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed." RESTATEMENT § 126, cmt. a

the attorney's fiduciary status, which dictates that the attorney maintain the highest degree of fairness and good faith and obligates the attorney *to come forward with convincing evidence that full disclosure was made to the client about the nature of the transaction and its effects on the client's interests.*

Our dissenting colleague does not dispute this placement of the burden of proof generally, but thinks that it should not apply here when it is not the client (Glover) who is alleging an ethical violation but a third party, *i.e.*, heirs to the estate. Smith goes even further and asserts, without citing authority, that "the only party able to invoke Rule 1.8 against . . . Smith is . . . Glover because she is the [c]lient" (Reply Br. for App. at 4). Neither point persuades us. The objecting heirs were not just any "third party." They were persons whose interests Glover was charged with protecting, and when in

heir view she failed to do so--in part by ignoring a conflict of interest on her attorney's part adversely affecting the sale of the townhouse--they stepped into her shoes, as it were, and asserted the conflict as reason to invalidate the sale. And, too, they raised the conflict in opposing Smith's request, sponsored by Glover, to be compensated by the estate for sale-related services they believed were tainted by Smith's divided interests. We do not see why, in such circumstances, the heirs should have been required to shoulder a burden of proof Glover would have been spared had she herself recognized the conflict and questioned Smith's actions--all the more so since Smith, not the heirs, was best equipped to show the circumstances surrounding the transaction with Glover.

In sum, then a business transaction between an attorney and client generally is so fraught with

the potential for a conflict of interest [5] that, once the transaction has been shown, the burden falls to the attorney to justify it in the multi-conditioned way Rule 1.8 (a) prescribes. Whether the listing agreement between Smith and the personal representative was presumptively "fraudulent," *Valley/50th Avenue, supra*, or merely such as to require her to prove compliance with each condition of Rule 1.8 (a), the probate judge correctly found that she had not met that burden and that the sale of the townhouse through Smart Choice was tainted by a conflict of interest. *Cf. also* D.C. Bar Op. No. 226 (1992) lawyer acting as attorney and real estate broker "with respect to a single transaction" should

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[5] *See* State Bar v. Dolenz, 3 S.W.3d 260, 265 (Tex. App. 1999) ("Business relationships between lawyers and clients are beset with conflicts of interest and will often involve situations in which the lawyer occupies a dangerously superior bargaining position.").

comply "with applicable ... Rules of Professional Conduct [including Rule 1.8 (a)] regardless of which 'hat' he is wearing in particular aspects of that transaction").

III.

The probate judge erred, however, in the remedy he exacted from Smith (and/or Smart Choice) for the conflict of interest. As explained, the objecting heirs cited the conflict in their twofold request that the judge (a) invalidate the sale of the townhouse (at a below-market price) as a breach of fiduciary duty by the personal representative, and (b) reduce the attorney's fees claimed by Smith as counsel to Glover. The judge did not invalidate the sale; rather, as pointed out, he ordered Glover to repay to the estate $ 75,000, the difference he found between the sale price and a price that would have reflected "reasonable market value." The correctness of that

ruling is not before us. Nor did the judge reject or reduce the attorney's fees requested on Smith's behalf, except by the (modest) portion of the fees representing her "time spent in this litigation." The judge, in other words, did not reach the question of the "reasonableness" of the requested fees under D.C. Code § 20-753 (2001). Instead, the judge dealt with Smith's conflict of interest by what he termed the "equitable sanction" of making her "disgorge" the $ 9,000 commission paid to Smart Choice for its services; that money was to be repaid to the estate through an offset to the attorney's fees otherwise due Smith--thus making assessment of the reasonableness of the fees unnecessary.

We find no statutory authority for the judge to order the remedy he did. Undeniably the judge had authority to decide the heirs' claims of breach of fiduciary duty by the personal representative, *see* D.C. Code § 20-743, for having let the estate's main asset be sold through a listing agreement tainted by a conflict of interest. But Smith, as attorney to the personal representative--*i.e.*, "an employee of the

personal representative," *Poe v. Noble*, 525 A.2d 190, 193 (D.C. 1987)--owed no fiduciary duty to the estate, and the fact merely that (in the judge's words) her conflicting interests "harmed [the estate]" did not permit the judge to order her, or Smart Choice, to disgorge a real estate commission in what amounted to damages payable to the estate. The situation is no different, we think, than if Glover had hired a home improvement contractor to renovate the townhouse and the contractor had breached the agreement or performed negligently; no one would fairly argue that the probate court, exercising its authority over the personal representative, could order the contractor to pay damages or make restitution to the estate for its negligence. Indeed, as a matter of personal jurisdiction, the third-party contractor might not even be before the court. Enforcement of the contract, instead, would rest there--and rests

here--with the personal representative, who in turn is accountable to the court for any failure in his stewardship of the estate. But reaching past the personal representative and ordering restitution directly by a contractor, including an attorney, as the judge did here, is not within the otherwise broad statutory authority possessed by the probate court.

Our decision in *Hopkins v. Akins*, 637 A.2d 424 (D.C. 1993), supports that conclusion. There the spouse of an intestate decedent sued the lawyer for the personal representative for breach of contract and legal malpractice, alleging that the lawyer had allowed another heir to divert estate assets and thereby breached a duty owed not just to the personal representative but to the estate beneficiaries. The trial judge agreed that the lawyer's duty of care extended to the heirs, and after a bench trial entered judgment against the lawyer in the

amount of the spouse's lost share of the estate. This court reversed, joining "the broad majority of the courts" that had barred suits by a beneficiary against an attorney of the personal representative for negligence. *Id.* at 428. The reason was essentially one of privity and the bedrock rule "'that the obligation of the attorney is to his client, and not to a third party,'" *id.*, quoting *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983):

> When an attorney is employed to render services in ... settling the estate, he acts as attorney of the executor, and not the estate, and for his services the executor is personally responsible. *Id.*, quoting RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 26.4, at 600 (3d ed. 1989) (citation omitted); *see also id.*, quoting *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 266 Cal.Rptr. 483, 489-90 (1990) ("The beneficiaries are entitled to even-

handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.").[6]

In this case, of course, the objecting heirs did not sue Smith--indeed, they sought no relief against her directly, though challenging the attorney's fees requested on her behalf by the personal representative. The judge nevertheless awarded what in effect were damages to the estate for breach of a duty that, under *Hopkins*, Smith did not owe the beneficiaries. If her sale of the townhouse in contravention of Rule 1.8 (a) resulted in harm to the estate, the remedy for that was an action by Glover

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[6] The court left open whether *intentional* wrongdoing by the attorney could rise to liability directly to the estate. *See Hopkins*, 637 A.2d at 430. In the present case, no claim is made that Smith engaged in intentional wrongdoing of any sort; her conflict of interest at most amounted to *per se* negligence in performing the duties she owed to the personal representative

against Smith or her company, or, failing that, an action by the heirs against Glover for maladministration of the estate. But neither "equity" nor any similar authority cited by us--or that we can find--allowed the judge to bypass the personal representative and enforce a duty of unconflicted representation that Smith owed to her and not the beneficiaries.

Accordingly, the case must be remanded to the probate judge with directions to vacate the order of disgorgement. At the same time, Smith's conflict of interest remains a relevant consideration for the judge in connection with the attorney's fee request made by the personal representative--a request the judge largely put aside by using the fee-request as a setoff against the commission he had ordered disgorged. To the extent the judge finds that particular services billed by Smith were affected by

her conflict of interest, the judge may take that into account in assessing the reasonableness of the fees requested. *See* D.C. Code § 20-753.

Reversed and remanded for further proceedings consistent with this opinion.

CONCUR BY: REID

REID, *Associate Judge*, concurring: I fully agree with Judge Farrell's opinion for the court. While I respect Judge Thompson's dissent, I cannot agree with her view that "the result the majority reaches today is unfair to [Ms.] Smith." Beginning on June 8, 2004, when Mr. Homer Brown filed pleadings opposing the sale of the property in question and objecting to the Personal Representative's request forcompensation for Ms. Smith, she clearly was on notice of her alleged conflict of interest due to her representation of the Personal Representative and

her role as sole owner of the company responsible for the real estate transaction. In addition, during the first day of a five-day hearing (which occurred on September 24, 2004, October 27, 2004, February 2, 2005, February 7, 2005, and February 8, 2005), the trial court clearly stated, "there is an objection for the commission of the sale of real estate alleging conflict of interest in that the real estate company that was involved in the sale of the real estate is alleged to have been owned by the attorney for the estate." Later on September 24, 2004, the trial judge stated: "So the next issue . . . that we will be dealing with is the question raised as to the sales commission, the allegation being that there was a conflict of interest . . . . So we will have to address that as well." Ms. Smith did not object to the trial court's statements and, in fact, said nothing about the conflict of interest allegation on September 24,

2004.

Nor did Ms. Smith raise any question about the conflict of interest issue on the second or third or fourth day of the hearing, which focused on testimony by experts and "whether the personal representative acted in the best interest of the estate by proceeding to sell the property based on an appraisal that was approximately a year old." On the fifth day of the hearing, February 8, 2005, Ms. Smith moved into evidence, without objection, the real estate contract for the transaction in question. Also, without objection, Mr. Brown's attorney moved into evidence the listing agreement for the property. After Mr. Brown's attorney called as a witness the daughter-in-law of the deceased, Ms. Smith inquired as to the nature of her testimony. In doing so, she summarized the two issues before the court stating, in part, that "the second issue was whether there

was a conflict of interest with counsel for Ms. Glover being the owner of the company that did the real estate transaction[]." Thus, Ms. Smith recognized that the conflict of interest issue was before the trial court. And, her strategy for addressing that issue became quite clear as she proceeded through her closing argument. After discussing the question of the appraisal, Ms. Smith declared: "With regard to the issue of whether there was a conflict of interest in counsel [for the Personal Representative] being the broker for [the Personal Representative's sale of the property], I would like to refer the Court to some definitions of who a real estate agent represents and I have a form for you." Other counsel objected to Ms. Smith's effort to introduce any document not admitted into evidence prior to closing. The trial court sustained the objection but nevertheless permitted Ms. Smith to make her argument

regarding the alleged conflict of interest. She asserted, in part:

> In the contract that has already be[en] submitted . . ., there is an acknowledgment by Agent Michael Lancaster that he represents the seller. Therefore, if the agent represents the seller, the broker stays on the same agency as the listing agent and therefore counsel in the role of a broker has the same role to Ms. Glover as the personal representative of the estate acting as a broker. So, there is no conflict of interest because as counsel, I have the same duty towards her and the estate
>
> In short, the record shows that Ms. Smith not only was on repeated notice that her alleged conflict of interest was at issue, but also that she understood the issue, laid the

foundation for her closing argument by introducing the real estate contract during the presentation of evidence, and then proceeded to contend in closing argument that no such conflict existed. In doing so, she completely ignored Rule 1.8 (a) of the Rules of Professional Conduct, as well as her burden, which Judge Farrell discusses in the opinion for the court. She also overlooked the role of the Personal Representative of Mr. Brown's estate. As we previously have reiterated: "Personal representatives act in a fiduciary role to administer decedent's estates." *In re Uchendu*, 812 A.2d 933, 937 (D.C. 2002) (citation omitted). "'A personal representative owes a fiduciary duty to the estate and its beneficiaries.'" *In re Estate of Leroy Green*, 912 A.2d 1198, 1209 (D.C. 2006) (quoting *In re Estate of Hines*, 715 A.2d 116, 119 (D.C. 1998)). "An important aspect of a personal representative's fiduciary duty is that [she] must place the best interests of the heirs

ahead of [her] own interests." *Id.* (citing *Richardson v. Green*, 528 A.2d 429, 436 (D.C. 1987)).

Finally, I believe it is important to recognize that the hearing before the trial court was not equivalent to a bar disciplinary proceeding where Bar Counsel places formal charges against and prosecutes an attorney during a formal evidentiary process. Rather, here the trial court was faced with an allegation made by one of the heirs against Ms. Smith in her role both as counsel to the Personal Representative and as owner of the company responsible for the sale of the decedent's property, and a concomitant objection to the real estate sale and the request for compensation. The trial judge

made certain that Ms. Smith understood that the alleged conflict was at issue, admitted into evidence the real estate contract at Ms. Smith's request, admitted the listing agreement at the request of Mr. Brown, and even allowed Ms. Smith to discuss her defense to the conflict of interest charge during closing argument. Under the peculiar circumstances of this case, I discern no unfairness to Ms. Smith.

DISSENT BY: THOMPSON

THOMPSON, *Associate Judge*, dissenting: In my opinion, the result the majority reaches today is unfair to Smith. I cannot join my colleagues in upholding the trial court's finding that she violated Rule 1.8 (a) of the Rules of Professional Conduct when Glover's siblings, who had the burden of proof in this proceeding before Judge Lopez, presented no pertinent evidence other than the fact of a business transaction between lawyer/real estate broker Smith and her client Glover; when neither the Probate Division's procedural rules nor the court's instructions required Smith to make an affirmative showing with respect to matters as to which the siblings had the burden of proof; where, before the trial court's ruling, Rule 1.8 (a) and its requirements were never mentioned in this litigation; and where this court has not interpreted the requirements of

Rule 1.8 (a) in the context of a straightforward real property listing agreement using a standard form.

A brief recap of the facts: The siblings objected to personal representative Glover's request to ratify the sale of the house (the estate asset), alleging that Smith did not disclose her interest in Smart Choice, the real estate brokerage company with which Glover contracted to list the property for sale. It appears that this allegation was incorrect, as Smith signed the listing agreement. Judge Lopez scheduled an evidentiary hearing and advised the parties that the issues on which he would hear evidence were whether the selling price was reasonable and whether Smith had a conflict of interest.[1] Judge

[1] As Smith reiterated the court's instructions, "[t]hose are the two issues that the Court instructed us to limit our testimony."

Lopez confirmed to the parties that the siblings had the burden of proof in the proceeding. All parties advised the court about the witnesses they expected to call, Smith saying that she anticipated calling Glover but explaining that whether she would do so depended on what evidence was presented by the siblings.[2] The siblings put on expert and lay testimony about the reasonableness of the sale price, but presented no evidence on conflict of interest.

More particularly, none of the witnesses mentioned Rule 1.8 (a) or testified about its requirements or whether they were satisfied. No witness testified that the terms of the listing

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[2] At one point in the proceedings, Smith inquired as to whether she might call Glover out of turn to present her testimony, explaining that it might be difficult for Glover to take off from work to be present in court at a later date. The court responded, "I am not so sure you want to do that because they [the siblings] have the burden of proof, and you'll want to hear what they have to say before you want to put on your evidence."

agreement--a Greater Capital Area Association of REALTORS, Inc. "Exclusive Right to Sell - Listing for Improved Real Property" agreement specifying a six-month exclusive right to sell and a 3% broker's fee--were unfair or unreasonable. There was no evidence that Smith denied Glover the opportunity to consult with independent counsel. There was no evidence that Glover did not understand the (uncomplicated) terms that were set out expressly in the listing agreement that she signed, or did not understand that Smith had an interest in the real estate brokerage company. The listing agreement states, as the only "Additional Term[ ]," that "Seller does not want agent to enter listing on MLS." There was no evidence that this approach was suggested to Glover or foisted upon her by Smith. There was no evidence that Glover--who, the record discloses, was a GS-11 personnel management specialist--was

incompetent. There was no evidence that Glover was dissatisfied with Smith's services.

At the close of the siblings' evidence, the court asked Smith whether she had "rebuttal evidence." Not surprisingly, she said she did not (there being no evidence on conflict of interest to rebut, and Glover having already put on her expert testimony out of turn). The court then heard the parties' closing arguments. Counsel for the siblings characterized Glover [**30] as having been "hell bent" on selling the property her way and insistent on selling the property without a multiple listing because she was indifferent to their interests.[3] Smith argued that her interests as broker were aligned with those of Glover

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[3] The record suggests that Glover wanted to sell the property quickly to relieve herself of the obligation to pay real estate taxes.

as seller, not with the buyer. On this record, the court found that Smith violated Rule 1.8 (a).

My colleagues in the majority justify this result on the basis of the principle that the lawyer bears the burden of proving compliance with Rule 1.8 (a). However, as far as I can tell, that principle pertains to assignment of the burden *as between lawyer and client. See, e.g., Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186, 190 (Wash. 2007). Comment (a) to section 126 of the Restatement (Third) of the Law Governing Lawyers, cited by the majority, states that "[i]n any civil proceeding *between a lawyer and a client* or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied." *Id.*(emphasis added). The principle assigning the lawyer the burden [**31] of proof also has some application in disciplinary

proceedings in cases, where the client alleges that her attorney has acted in a way inconsistent with the rules governing professional conduct, *see, e.g.*, *Hunniecutt v. State Bar*, 44 Cal. 3d 362, 243 Cal. Rptr. 699, 748 P.2d 1161, 1167 (Cal. 1988); and, more generally, where the lawyer has an affirmative duty (but not the sole burden) to come forward with evidence bearing on her compliance with the Rules in question. *See* D.C. RULES OF PROF'L CONDUCT R. 8.1 (b) ("[A] lawyer in connection with a . . . disciplinary matter, shall not . . . fail to disclose a fact necessary to correct a misapprehension known by the lawyer . .. to have arisen in the matter, or knowingly fail to respond reasonably to a lawful demand for information from an admissions or disciplinary authority . . . .").

Even in disciplinary cases, however, Bar Counsel has the burden of proving a violation of the

Rules of Professional Conduct by clear and convincing evidence, *see In re Cater*, 887 A.2d 1, 13 (D.C. 2005), and a respondent is not required to "make Bar Counsel's case." *In re Artis*, 883 A.2d 85, 99 (D.C. 2005). This court has upheld Board on Professional Responsibility/Hearing Committee recommendations that charges be dropped where Bar Counsel presented no evidence to sustain the charge that a lawyer violated a rule of professional conduct. *See In re Douglass*, 859 A.2d 1069, 1072-73, 1085 (D.C. 2004) (sustaining "the Board's determination that no violation of Rule 1.8 (g)(2) has been established under the applicable standard of proof" because "Bar Counsel was unable to prove that Mr. Walker did not represent Mrs. Wilson at the crucial time"); *cf. In re Lawrence*, 954 So. 2d 113, 118 (La. 2007) (upholding hearing committee finding that no violation of Rule 1.8 (a) was proven where no

evidence was introduced to establish that client was denied the opportunity to seek the advice of another attorney before she signed the agreement with respondent and client did not deny understanding the terms of the agreement). As far as I have been able to determine, the principle that the lawyer bears the burden of proving compliance with the rules of professional conduct has not heretofore been applied in a case such as this, where it is a third party, not the client, that alleges a violation and that third party fails utterly to present any evidence on the issue. In cases such as this, I do not believe that this principle displaces the familiar rule, applicable in probate proceedings as well as others, that it is the moving party (here, the siblings) that bears the burden of proof.

We would have a different case if Rule 1.8 (a) flatly prohibited business transactions between

lawyer and client, or prohibited a lawyer from acting as both attorney and real estate broker. But the plain language of the rule does not establish any such broad prohibition, nothing in our decisions suggests such a broad prohibition, and it appears from our decision in *In re Pierson*, 690 A.2d 941 (D.C. 1997), that the Bar community does not understand the Rule 1.8 (a) to impose such a prohibition. *See id.* at 944 (referring to a hearing committee finding that "the facts . . . did not establish a violation of Rule 1.8 (a) ... [because] not every transaction with a client requires separate counsel or the client's written consent"). I am aware of only one case from another jurisdiction holding that a lawyer may not act as both lawyer and real estate broker for a client. *See In re Estate of Schuldt*, 428 N.W.2d 251, 259 (S.D. 1988) ("There is a need to limit the attorney's role to that of an attorney in probate proceedings. An attorney

should be an attorney first and foremost, not broker or executor or whatever hat he can find to wear."). Even in that case, the court stated that it would give this prohibition only future effect. *See id.* at 258 ("We note for the future that it is doubtful whether this arrangement would pass muster against Rule 1.8 (a) ....").

As the majority notes, District of Columbia Bar Ethics Opinion No. 226 states that where a lawyer "is performing both professional roles (lawyer and [real estate] broker) with respect to a single transaction, . . . he should comply with applicable provisions of the Rules of Professional Conduct . . . ." However, this court has never interpreted Rule 1.8 (a) in a context such as the one presented here, involving a straightforward real estate transaction and a standard form listing agreement. Without exception, the cases in which we have interpreted

Rule 1.8 (a) or found violations of the Rule have involved a business transaction--most typically, a loan from the client to the lawyer--that manifestly was solely for the advantage or convenience of the lawyer (and of no apparent benefit to the client, and, in many cases, entailing a non-standard instrument prepared by the lawyer) and/or a transaction with an elderly, incompetent or otherwise vulnerable client. *See In re Elgin*, 918 A.2d 362, 375 (D.C. 2007) (lawyer used client's credit card and thereafter settled a collection suit by the credit card company against the client "on terms which he negotiated and apparently did not disclose to [the client] in violation of . . . [Rule 1.8 (a)] requiring that the [client] be 'given a reasonable opportunity to seek the advice of independent counsel in the transaction'"); *In re Bailey*, 883 A.2d 106, 111, 111 n.12, 113 (D.C. 2005) (lawyer borrowed proceeds of client's personal injury

settlement suit and violated Rule 1.8 (a) by failing to advise client, who "had difficulty fully comprehending spoken English," to seek the advice of independent counsel to review promissory note prepared by lawyer; no finding that the transaction was unfair or unreasonable to the client even though lawyer did not provide client with the prevailing interest rate). *See also In re Douglass*, 859 A.2d at 1081-82 (lawyer violated Rule 1.8 (a) where, after client indicated her intent to discharge lawyer, lawyer "informed her that she would have to sign a note confessing] judgment to [the lawyer] in the amount of $ 750 for his legal services, as well as a release shielding him from [malpractice liability]" and "did not advise [her] to seek the advice of another attorney about the confession note and the release, and also did not fully disclose the terms of either of those documents . . . . For example, [the

lawyer] did not inform [client] of his hourly rate, the amount of actual hours he had expended on [her] matter, or the basis for the $ 750 quantum meruit calculation for the confession note. Nor did [the lawyer] explain technical legal terms in the documents"); *In re Austin*, 858 A.2d 969, 972-73 (D.C. 2004) (lawyer violated Rule 1.8 (a) where he sought and received a number of personal loans totaling over $ 26,000 from his 73-year-old client even though he "was aware of [her] limited financial resources and lack of sophistication" and did not advise her to seek the advice of independent counsel); *In re Maxwell*, 798 A.2d 525 (D.C. 2002) (reciprocal matter involving the facts of *Maxwell v. Gallagher*, 709 A.2d 100, 102 (D.C. 1998), which describes the lawyer's actions in acquiring stock in a client's corporation as "double dealing" and "failing to disclose the business

advantages they sought"); *In re Viehe*, 762 A.2d 542, 543 (D.C. 2000) (lawyer violated Rule 1.8 (a) where, using checks that clients had signed, for use in completing a real estate transaction, without writing in a payee or amount, lawyer wrote himself checks totaling $ 77,500, without making the necessary disclosures or obtaining the clients' written consent); *In re Jones-Terrell*, 712 A.2d 496, 498-99 (D.C. 1998) (lawyer violated Rule 1.8 (a) by engaging in a transaction with a client without full disclosure or fair and reasonable terms where she caused elderly client, who was found to be incapable of making "rational decisions about her finances or her health," to sign an agreement specifying that lawyer and her husband would move in with client rent-free, for one year); *In re McLain*, 671 A.2d 951, 953 (D.C. 1996) (finding that lawyer violated Rule 1.8 (a) where he

borrowed $ 21,500 from clients to help satisfy his income tax obligations and gave them a promissory note which he never explained and did not recommend that another lawyer review the note, and where he asked the same clients for a loan to purchase a house and clients agreed to buy the house and to let lawyer live in the house in exchange for monthly payments equal to the mortgage plus expenses and taxes); and *In re White*, 605 A.2d 47, 48 (D.C. 1992) (reciprocal discipline matter in which lawyer was sanctioned for violating Rule 1.8 (a) where he induced 88-year-old client to "loan" him over $ 160,000).

In some of the foregoing cases involving business transactions with vulnerable clients and/or

for the sole advantage of the lawyer, we sustained a finding that the respondent lawyer had violated Rule 1.8 (a) by failing to advise the client to seek the advice of independent counsel. But we have never held that Rule 1.8 (a) invariably requires such affirmative advice rather than, in the language of the rule, "a reasonable opportunity to seek the advice of independent counsel in the transaction."[4] (I note that, by contrast, Rule 1.8 (g)(2) prohibits a lawyer from making an agreement prospectively limiting the lawyer's liability to a client for malpractice "without first advising that person in writing that independent representation is appropriate in connection there with.") A number of states have adopted

[4] Moreover, the comments to Rule 1.8 (a) state not that a review by independent counsel on behalf of the client is always necessary, but instead that such a review is "often advisable."

the language of ABA Model Rule 1.8 (a) that does require such affirmative advice.[5]

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[5] Model Rule 1.8 (a) states:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

MODEL RULES OF PROF'L CONDUCT R. 1.8.

I note that courts in states that have adopted this model language have not always strictly enforced [**41] the affirmative-advice-in-writing requirement. *See, e.g., Milo Fields Trust v. Britz,* 378 N.J. Super. 137, 874 A.2d 1130, 1138 (N.J. Super. Ct. App. Div. 2005) (holding, despite New Jersey rule

(continued on next page)

See, e.g., Attorney Grievance Comm'n v. Parker, 389 Md. 142, 884 A.2d 104, 111 n.3 (Md. 2005) ("In the revised [Maryland Rules of Professional Conduct] that we adopted effective July 1, 2005, Rule 1.8 (a)(2) specifies that the client be advised in writing of the desirability of seeking the advice of "independent legal counsel." (internal emphasis omitted)). Our jurisdiction has not done so, and I see no reason why we should uphold the finding here that Smith violated Rule 1.8 (a) on the basis of a failure to prove that she advised Glover to

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prescribing that client be advised in writing of the desirability of seeking independent legal advice about a proposed business transaction between lawyer and client, that "it is not mandatory that an attorney advise his client in writing to seek independent counsel"); *Twachtman v. Hastings*, No. CV 9557307S, 1997 Conn. Super. LEXIS 2014, *21, *30 (Conn. Super. Ct. 1997) (holding, despite Connecticut rule requiring that the "client or former client [be] advised in writing that the client or former client should consider seeking the advice of independent counsel in the transaction," that "there is no indispensable requirement that the client actually receive [independent legal advice] from another attorney or that he be instructed by his attorney that such an alternative is available to him").

seek independent counsel where our rule does not explicitly require this, and where the terms of the transaction do not on their face appear to have been unfair to either party (a six-month exclusive right to sell in exchange for a discounted commission, terms that, it would seem, left both seller and broker with an incentive to sell the property for the highest possible price). In my view, the transaction here raises no more red flags than "a contingent fee agreement with a client in a civil case," which the comments to Rule 1.8 (a) states are not precluded by the Rule so long as the contingent fee agreement complies with Rule 1.5 (c) (requiring a written agreement stating how the fee is to be calculated).[6]

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[6] I note that, like the broker's fee here, a contingent fee arrangement affords the lawyer an incentive to resolve the

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Courts in some other jurisdictions have found violations of Rule 1.8 (a) where a lawyer acted as both real estate broker and lawyer to a vulnerable client or pursuant to an unusual listing agreement that was to the obvious and lopsided advantage of the lawyer. *See In re Moores*, 854 N.E.2d 350, 352-53 (Ind. 2006) (lawyer who was also a real estate broker violated Rule 1.8 (a) where he requested a legal retainer that the clients could not pay in full, and so to protect himself, lawyer had the clients sign, without the benefit of independent legal counsel, an eight-year exclusive listing agreement that was on terms unfavorable to the clients and that included language that the lawyer acknowledged was

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matter for the highest possible amount of money, but does not guarantee against the lawyer's efforts to achieve a quick but less lucrative settlement. Lawyers' hourly fee arrangements with their clients also may provide incentive for lawyers to run up a high number of billable hours, but our rules and case law do not suggest that such fee agreements must be reviewed by independent counsel.

unusual, giving him the right of refusal on the sale of the property); *In re Lupo*, 447 Mass. 345, 851 N.E.2d 404, 407-08, 411 (Mass. 2006) (violation of Rule 1.8 (a) where, among other things, lawyer-real estate broker had elderly clients sign a standard form listing agreement with some of the information, including his fee, not yet specified, and did not advise the clients that they should seek independent counsel). However, other than *In re Estate of Schuldt*, 428 N.W.2d 251, discussed *supra*, where the court stated that it would give only prospective effect to its holding that lawyers should not simultaneously act as lawyers and real estate brokers, I am aware of no case in which a court found a violation of Rule 1.8 (a) solely

from the fact of a lawyer's acting as real estate broker for the client, or solely because it was not shown that the lawyer advised the client to seek independent legal counsel.[7] Nor am I aware of a case in which a court found a violation of Rule 1.8 (a) solely from the fact that the lawyer did not prove that she explained the ways in which client's and the lawyer/real estate broker's interests might not be identical. Our prior disciplinary rules may have contained such a requirement. In our jurisdiction, Rule 1.8 (a) replaced former Disciplinary Rule 5-104 (A) as of January 1, 1991. *See In re McLain*, 671 A.2d at 952 n.1.

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[7] And it is not hard to imagine that (and to understand why) a client who is trying to settle an estate whose major asset is a parcel of real property would, for the client's own benefit, desire and perhaps seek the services of a lawyer who could act as both lawyer and broker and eschew the expense and inconvenience of seeking other legal counsel to review a listing agreement.

The language of Rule 5-104 (A) was different: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." As we explained *In re James*, 452 A.2d 163, 167 (D.C. 1982), that "'[f]ull disclosure' includes a clear explanation of the differing interests involved in the transaction and the advantages of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client entailed in the agreement, including any liabilities that will or may foreseeably accrue to him." The "consent after full disclosure" language used in former Rule 5-104 (A) is

missing from Rule 1.8 (a)(3) ("the client consents in writing there to"), and I do not believe that we can fairly read any other portion of Rule 1.8 (a) to impose an identical requirement. We have said that Rule 1.8 (a) is "similar" to Rule 5-104 (A), *see In re McLain*, 671 A.2d at 952 n.1, but we have not said that the two rules are to be construed as identical. As noted, Rule 5-104 (A) required "client consent [] after full disclosure," and "full disclosure" entailed, *inter alia*, an explanation of the advantages of seeking independent legal counsel. By contrast, Rule 1.8 (a)(1) requires that the "transaction" be "fully disclosed," language that appears to refer to a narrower requirement than the "client consent [] after full disclosure" language of Rule 5-104 (A) imposed (since, for example, Rule 1.8 (a)(2)

deals separately with advice of independent legal counsel).

To summarize, the siblings, who had the burden of proof, did not offer evidence that Smith failed to satisfy the requirements of Rule 1.8 (a) (1) - (3), and I do not believe that we are entitled to assume that the requirements were not satisfied, either from the mere fact of Smith serving as both lawyer and (through her real estate company) broker, or from the fact that, in a non-disciplinary proceeding where her client was not the aggrieved party, Smith presented no evidence as to compliance with the Rule. I do not suggest that Smith's conduct was exemplary, and I would not foreclose a finding that she violated Rule 1.8 (a) if a hearing committee

were so to find (after notice to Smith of any rule she is alleged to have violated, and a hearing). But, on the record before us, I believe we should decline in this appeal to uphold the trial court's ruling that Smith violated Rule 1.8 (a).[8]

I respectfully dissent.

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[8] This is both because, I believe, the ruling should not be *res judicata* as to Smith, and because it may well disserve the legal community to find a violation of Rule 1.8 (a) in the circumstances involved here on a record that was not fully developed in the trial court. *Cf. In re McLain*, 671 A.2d at 953 ("With respect to the charge of misrepresentation of the firm's name, we would not be able to reach a conclusion without a careful analysis, as this court has not previously ruled on whether the inclusion of an associate's name in a firm name violates our Rules of Professional Conduct. Under the particular circumstances present here, we will not undertake that analysis in this proceeding . [**47] . . . Because . . . we do not have the benefit of adversary briefing and presentation, we deem it inappropriate to decide this issue of first impression.").

Appendix C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

IN RE:	:	
	:	
ESTATE OF SOLOMON BROWN	:	ADM. NO. 1374-03
	:	Judge Lòpez
DECEASED	:	

ORDER

Upon consideration of the Motion For Reconsideration of Order Dated February 22, 2006, filed by Michelle D. Smith purportedly on behalf of herself and not as counsel to Auldrey Glover, personal representative of the estate of Solomon Brown, the Opposition of Homer Brown To Motion For Reconsideration, the authorities cited, and it appearing to the Court that Michelle D. Smith lacks standing, pursuant to *SCR-PD 430,* to file a motion for reconsideration in her own name as attorney and not as counsel to one of the parties, and it further appearing to the Court that the Motion does not state a basis upon which it may be granted because

no evidence was produced by Auldrey Glover that she undertook reasonable and prudent steps to market the property when the broker was also her attorney and the listing agreement precluded use of the MLS listing, it is by the Court this 4th day of April, 2006,

ORDERED, Than the Motion For Reconsideration be, and the same is hereby, denied.

/s/ Jose M. Lopez
Judge

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Appendix D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

IN RE:	:	
	:	
ESTATE OF SOLOMON BROWN	:	**ADM. NO. 1374-03**
	:	
DECEASED	:	

Litigation in this estate was prompted as a result of two events. On May 24, 2004 Auldrey Glover, personal representative, through her attorney, Michelle Smith, filed her first and final account. Then on Mary 25, 2004 Ms. Glover filed a petition to ratify the sales of the real estate, the main asset of the estate herein.

On June 18, 2004 Homer G. Brown, through his attorney, Nicholas Ward, filed an exception to the first and final account. He noted that the Accounting period began on August 20, 2003, as opposed to the date of death, May 31, 1992. He objected to the real, estate commission of $9,000.00shown on the account because the real estate broker is counsel for the

estate, thus alleging that there is a conflict of interest. The account charges $208.00 for the removal of a piano that was not included in the inventory. Mr. Brown argues that to the extent the estate was not given the opportunity to sell the piano, it should not be charged for the removal. Finally, Mr. Brown takes exception to the sales of the real estate, arguing that although the personal representative sold it for $300,000.00, shortly thereafter it was sold for $700,000.00.

In addition, on September 23, 2004, the estate of Mary James, a beneficiary herein, through Lorenzo Randall, Esq., filed an opposition to the petition for ratification of the real estate. Mr. Randall states that Mary James never consented to the sale of the property, and that it was sold for a sum considerably lower than the value of the property. They also object to the real estate commission.

Auldrey Glover filed a reply to the exception and objection, and agreed to restate the account to

reflect May 31, 1992 as the starting date for the account. She also indicated that she should be permitted to take a credit for real estate taxes hat she paid for the property from her personal funds. She argued the Piano had no value, and removal was necessary to make the property more presentable for the sale. As result, the Court conducted a trial to consider the issues.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Solomon Brown died intestate on May 31, 1992, the owner of, and a resident in, 2020 15th Street, N.W., Washington, D.C., hereinafter the "subject property." Mr. Brown was survived by three daughters, two sons and the

children of two pre-deceased daughters and one deceased son.[1]

2. Auldrey Glover, one of the daughters lived in the subject property until 1998. In 2001 she boarded the livable house up.[2]

3. In 1995 Auldrey Glover received in the mail a written offer of $300,000 for the purchase of the subject property, but she turned it down as being too low and she did not want to sell the property.[3]

4. Auldrey Glover came and lived with Debra Knight-Brown and her husband Homer Brown, a son of the decedent, from May 2002 until August 2002.[4]

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[1] Petition for Probate, Plaintiff's exhibit hereinafter "P" 24.

[2] P. 15.

[3] Debra Knight-Brown, Transcript, hereinafter "T" February 8, 2005, page, hereinafter "p" 119.

[4] T 116 (February 8, 2005)

5. In May 2002, Mr. Homer Brown inquired of Auldrey Glover what was going on with the subject property. She stated, "I'm going to have to do something because I cannot pay taxes on a 700 thousand-dollar house."[5]

6. Sometimes between May 2002 and August 2002 Auldrey Glover wrote to the Office of Tax and Revenue seeking to have that Office treat the subject property as a vacant house rather than an abandoned house,[6] because the tax rate for an abandoned residence is much higher.[7]

7. On June 24, 2002, Auldrey Glover discussed probating the estate of Solomon Brown with attorney Michelle D. Smith.[8]

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[5] T 119 (February 8, 2005)
[6] P. 15; T116 (February 8, 2005)

[7] T pages 78, 79 (October 27, 2004)

[8] P. 25.

8. Sometime during the summer of 2002[9] Auldrey Glover contacted Patrick F. Casey CGA and told him she needed an appraisal, for the probation of an estate and asked him to appraise the property as of the date of death, but he could not locate market data anterior to 1995, so they agreed he would appraise the subject property as of the date of his inspection.[10] He subsequently inspected the property on September 16, 2002, and prepared an appraisal dated October 30, 2002.[11] Mr. Casey testified that .Auldrey Glover's use of his appraisal did not have any impact on the market value he came up with because his

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[9] Defendant's exhibit, hereinafter "D" shows receipt of a check from Auldrey Glover on

August 16, 2002.

[10] T 89.90 (Februaıy 2, 2005)

[11] P. 5 .

goal was to establish market value,[12] that is, the most probable sales price of the property.[13]

9. In the appraisal, Mr. Casey represented that "I have personally inspected the interior and exterior areas of the subject property...." Mr. Casey described the condition of the subject property: "The improvements are dilapidated and in extremely poor condition with holes in the roof and structural damage and is unsafe and utilities are turned off. Subject has been neglected for an extended period of time[14] and is in need of complete rebuilding." Mr. Casey noted the existence of one kitchen. In fact the subject property has three kitchens.[15] Mr. Casey, however, did not go up on the roof and was told that the roof had holes in it at the

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[12] T 22 (February 7, 2005)

[13] T 80 (February 2, 2005)

[14] Mr. Casey testified, "It had been vacant for 10 years..." T 81 (February 2, 2005)

[15] T 127 (February 8, 2005)

time he made his inspection.[16] Mr. Casey was not sure he ever spoke to Auldrey Glover again,[17] and had no recollection of any specific conversation with her.[18] He was not asked by Auldrey Glover to up date his appraisal[19] and he did not advise either Auldrey Glover or Ms. Smith that a new appraisal should be prepared.[20]

10. On September 17, 2002, the day after Mr. Casey's inspection of the subject property, Auldrey Glover signed a contract with William Day, Small Contractor, Inc. for roof repairs. She also discussed roof repairs with Michelle D. Smith on March 12, 2003.[21]

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[16] T 81 (February 2, 2005

[17] T 64 (February 7, 2005)

[18] T 70 (February 7, 2005)

[19] T 35 (February 7, 2005)

[20] T 35, 101 (February 7, 2005)

[21] P. 28; P 25

11. In the beginning of 2003 Homer Brown called Auldrey Glover and inquired what was going on. She advised him that she had had the subject property appraised for $258,000. Upon his exclaiming that this was low, she advised him that the appraisal was simply for filing a report for probate and that the subject property would be reappraised again before being sold.[22]

12. Mr. Homer Brown received a letter dated March 12, 2003, from Michelle D. Smith containing a Consent To Appointment of Personal Representative and Waiver of Personal Representative's Bond in which she requested him to consent to the probate and waive bond.[23] After he received this letter he called Auldrey Glover regarding the appraisal for $258,000 and she assured him that another

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[22] T 128 (February 8, 2005)

[23] P. 26.

appraisal would be done before selling the subject property. Mr. Homer Brown then advised her he would sign the papers.[24]

13. Auldrey Glover filed her Petition for Probate on July 23, 2003, and was appointed unsupervised personal representative on August 20, 2003.[25]

14. Mr. Homer Brown had occasion to go by the subject property in the fall of 2003 and he never saw a for sale sign outside of the subject property.[26] In fact the property was listed for $258,000 with Michelle D. Smith, attorney at law and real estate broker,[27] doing business as Smart Choice Real Estate, and the Listing Agreement contains a handwritten entry

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[24] T 129 (February 8, 2005)

[25] Docket entries.

[26] T 131. (February 8, 2005)

[27] P. 26

"Seller does not want agent to enter listing on MLS."[28]

15. Michelle D. Smith spent one hour on October 23, 2003, explaining to Auldrey Glover the contract of sale of the subject property for $300,000.[29]

16. When Mr. Homer Brown learned that the subject property had been sold for $300,000 in December 2003 he called Auldrey Glover who told him there's nothing that can be done and offered him no reason for the sale at that price.[30]

17. Michelle D. Smith wrote Mr. Homer Brown on March 22, 2004, enclosing an amended Petition for Probate to list Kenneth Whittingham Plummer, previously unlisted

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[28] P. 27

[29] P. 25; D 29

[30] T 131 (February 8, 2005)

heir and noting the value of the subject property as $268,000.[31]

18. Just before May 2004 Mr. Homer Brown learned that the subject property had been re-sold in March 2003, for $730,000, having been listed for $599,000. He called Michelle D. Smith and inquired about this resale and she said she would call Mr. Chin, the purchaser and find out what happened. She stated that it was due to the fact that Mr. Chin had made improvements to the subject property. Upon inquiry Mr. Brown learned that no permits had been issued for any changes in the subject property.[32]

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[31] P. 24

[32] T 133, 134; Letter from Lennox Douglas, Manager Permit Service Center, Building

and Land Regulations Administration Department of Consumer and Regulatory Affairs,

Government of the District of Columbia to Mr. Homer Brown attached to Exceptions To

First and Final Account of Auldrey Glover filed herein, June 15, 2004.

19. Michelle D. Smith and Auldrey Glover signed an inventory dated May 21, 2004, and mailed it to the heirs, in which the subject property is carried at $258,000.[33]

20. Auldrey Glover's First and Final Account was filed May 24, 2004.34 This account commenced from August 20, 2003 (the date of her appointment as personal representative) and rant through August 20, 2004. The first account of a personal representative is to commerce with the date of death. *SCR-PD 114(b).*

21. In May, Michelle D. Smith and Auldrey Glover filed a Petition For Approval of Sale since they had not obtained waivers from all the heirs for the bond and a Praecipe to correct the address of the subject property.[35]

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[33] P. 22.

[34] P. 23.

[35] Docket entries.

22. Auldrey Glover and Michelle D. Smith filed Request For Compensation in May 2004, in which they requested compensation for the Personal Representative in the amount of $6,250 and for Michelle D. Smith in the amount of $9,692.72. The First and Final Account, taking account these proposed disbursements, including $218 for a piano not otherwise carried in the inventory, shows $224,472.62 available for distribution to the heirs in eight divisions, including $28,059.08 to Auldrey Glover.[36]

23. Homer Brown filed timely Exceptions to the First and Final Account, Objections to the Request for Compensation and an Opposition the Petition For Approval of the Sale of Real Property.

24. Lorenzo Randle, Personal Representative of the estate of Mary James, a daughter of the

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[36] P. 23.

decedent who died after Solomon Brown, filed a seasonable Opposition to the Petition for Approval of the Sale and the Request For Compensation.

25. The Court held a trial on the issues on October 27, 2004, February 2, 7, and 8, 2005, in which the Objectors had the burden of proof and had two lay and two expert witnesses[37] and the Personal Representative elected not to be present but was represented by her attorney, Michelle D. Smith, and produced one expert and two representatives from the D.C. Government.

26. The Court directed the parties to address the issue of whether under the circumstances it was reasonable for the Personal

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[37] Ms. Smith objected to the Objectors' second expert witness on the grounds that the Objectors had represented that they had only one expert. The transcript of the proceedings on September 24, 2004, demonstrates that no such representation was made.

Representative to offer for sale the subject property on the basis of an appraisal that was more than a year old[38] and whether it is a

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[38] The focus is on what was the market condition at the time of the sale and considering the market condition, what, if any, would been expected of the personal representative in order to ascertain that she had a fair market value for the property at that time." T. 17 (September 24, 2004) "And I tell you it is incumbent upon the proponents that the price was not a reasonable, fair market value to present to the Court, A, evidence of what the market was like at the time it was sold, and B, that it is not far-fetched to have expected the personal representative to do further inquiry regarding those market conditions prior to selling at the price of $300,000, *** "...We're looking at the values in that period of time to see if a reasonable personal representative would have relied on that 2002 appraisal or would have considered an appraisal that would be more up-to-date to the values of October 2003. T 131 (February 2, 2005

"So the next issue...we will be dealing with is the question raised as to the sales commission, the allegation being that there was a conflict of interest. Because it is alleged that the brokerage company, real estate company that sold the property

conflict or interest for the Personal Representative to engage the services of her attorney as the broker to effect the sale. The relevant time period for the presentation of evidence of market conditions was fixed at from September 16, 2002, (date of appraisal) to October 23, 2003, (the date of ratification of the contract for sale)[39]

27. All the expert witnesses agreed that in the time frame September 16, 2002 through October 23, 2003, the real estate market in which the subject property is located was hot,[40] appreciating,[41] a period of rapid escalation,[42] and the price point in which

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was owned...by Ms. Smith, counsel for the estate. And the allegation is ____ that presents a conflict of interest." T21, 21 (September 24, 2004)

[39] T 21 (September 24, 2004)

[40] T 64 (October 27, 2004, Minnetta E. Coles).

[41] T 18 (October 27, 2004, Herbert Gaylord Curry);

[42] T 15 (February 2, 2005, Mark Kessler)

transactions are taking place between the buyers and sellers was rising faster that it had risen in the past.[43]

28. Mr. Casey wrote in his 2002 appraisal "Market demand is very strong and far outweighs supply. Consequently equilibrium is rising at unprecedented rates. Interest rates are ranging from 5.0% to 7.5% for 30 year fixed rate financing. Discount points are falling between 1 and 4 depending on which interest rate is preferred with buyer & seller frequently splitting the transfer taxes. Seller concessions are not prevalent within subject's market area. Trends in value & demand trending higher as evidenced by sales prices higher than listing prices and the short time to market properties." Mr. Casey testified that it looked like the prices were going to be going higher than listing prices and the short time

[43] T 30 (February 7, 2005, Patrick F. Casey)

to market properties." Mr. Casey testified that it looked like the prices were going to be going higher on the subject property.[44] In fact Mr. Casey was requested to re appraise the property in 2004 as of October 13, 2003, which he did on September 24, 2004, and arrived at a value of $350,000.[45] He was told to assume that the condition of the subject property had not changed.[46] He testified upon being shown evidence of roof repairs of $14,405.00, that such work could increase the value of the property by 75% of the repair cost.[47] Thus his appraisal would be for an additional $10,803.75, or simply $360,000 total.

29. Mr. Curry appraised the subject property, without going into it, on October 15, 2004, as

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[44] T 31 (February 7, 2005)

[45] D 26; T 146 (February 2, 2005)

[46] T 72 (February 7, 2005)

[47] T 7578; P23 and 28

of October 23, 2003, for a value of $410,000.[48] He stated that if the subject property wasn't in al shell condition in October 2003 that he would increase his estimate of value to $500,000 plus.[49]

30. Mr. Kessler provided an oral appraisal in Court that in his opinion the subject property should have been listed for sale at $500,000 to $600,000, and probably sold for $700,000.[50]

31. All the appraisers based their appraisals on the basis of comparable sales and criticized each others' choices of comparable sales in arriving at their value estimate. Mr. Kessler said two of Mr. Casey's comparables too old in point of time, greater than six months, because in a period of rapid appreciation a large increase would take place in that time

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[48] P. 2.

[49] T 23,24 (October 27, 2004)

[50] T 54 (February 2, 2005)

period.[51] Mr. Casey thought two of Mr. Curry's comparables were not truly comparable because in much better condition.[52] Curiously both Mr. Casey in his 2003 appraisal and Mr. Curry selected 1217 Euclid Street as a comparable.[53]

32. The Euclid Street property, while in Columbia Heights and not Old City Two, the section wherein the subject property is located[54], sold in applicable period once for $220,000[55] and then within the year for $321,000[56] a rate of appreciation in excess of the general rate of appreciation in the area of 15% to 25% seen by Mr. Curry.[57]

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[51] T 35, 36, 57 (February 2, 2005)

[52] T 102, 103 (February 2, 2005)

[53] D 26 and P 2.

[54] T 53, 55 (October 27, 2004)

[55] D 19.

[56] D 20.

[57] T 15 (October 27, 2004 Curry)

33. Mr. Kessler stated that 2017 13th Street, N.W. which sold in December 2003 for $390,000 was a good comparable because it was an as is property and close in proximity to the subject property and was more reflective of developable properly at that time.[58] He also pointed to 1423 W Street, N.W. that sold for $380,000 in June 2003, but was tenant occupied.[59] More importantly, Mr. Kessler referred to these properties as reflecting the bottom range because they are not as large and do not have the developmental potential as the subject property.[60]

34. Both Mr. Kessler and Mr. Curry selected 1206 T Street,. N.W. as an applicable comparable because although tenant occupied, it was a three story Victorian, with parking, but needing lots of work and having many original

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[58] P. 17; T 30 (February 2, 2005)

[59] P. 17; T 31 (February 2, 2005)

[60] T 31 (February 2, 2005)

details and in a good location. It sold in July 2003 for $576,500.[61] Mr. Curry took a downward adjustment of $75,000 for this property in his appraisal,[62] which Mr. Casey thought was too little and should be more like $200,000 because of the difference between a livable house and a shell.[63] Mr. Kessler thought 1936 15th Street, N.W., which sold in October for $600,000 a good comparable[64] and it was used by Mr. Curry in his appraisal with a $100,000 adjustment[65] but Mr. Casey thought a downward adjustment of $200,000 to $300,000 would be needed.[66]

35. Mr. Kessler further cited 1312 Riggs Place, N.W. which sold for $518,000 in July 2003, a

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[61] P. 18; P 2; T 32-33 (February 2, 2005)

[62] P. 2

[63] T 107

[64] P. 8; P 14___ & (b); D 1; T 46 (February 2, 2005)

[65] P. 2

[66] T 108 (February 2, 2005)

four level Victorian in better condition, but sold in as is condition and presented a "thrilling" opportunity.

36. The Court is not so much concerned at this point in ascertaining the value of the subject property on September 16, 2002, or necessarily what the appraisers think the value was in October 2003, as it is in ascertaining whether there exists a reasonable basis to find that reliance on any appraisal, more than a year old in fixing the asking price for a residence in Old City Two in October 2003 would be misplaced.

37. It was pointed out that the subject property was a shell in poor condition, but which retained architecturally significant features that would make it attractive to investor purchasers.[67] Mr. Curry saw the highest and

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[67] T 39 (October 27, 2004, Curry); T 81 (February 2, 2005, Casey); T 18, 19 (February 2, 2005, Kessler's definition of a

best use as renovation,[68] although he stated it would be more valuable if it could be converted into condominiums.[69] Mr. Casey thought the highest and best use would be its present use[70], by which he meant simply to hold the subject property as it was and wait for the market to rise.[71] Mr. Kessler saw the highest and best use as condominiums.[72]

38. It was generally agreed that in determining value, location was of prime importance[73] and condition next in importance.[74] In finding comparables those with the closest location

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shell differs from the others, but all acknowledged the property needed work.)

[68] P. 2.

[69] T 21 (October 27, 2004)

[70] P. 5.

[71] T 37-40 (February 7, 2005)

[72] T 18 (February 2, 2005)

[73] T 99 (February 2, 2005, Casey); T 53 (February 7, 2005, Casey)

and condition are most desirable because only minimal adjustments need be made.[75]

39. The subject property is in a good location and many of the properties in the exhibits of Auldrey Glover are in inferior locations and many of the properties in the exhibits of Auldrey Glover are in inferior locations and thus do not provide good comparables such as 1221 Harvard Street, N.W.,[76] and 775 Columbia Road, N.W.[77] Others were too near Clifton Terrace to be effectively comparable[78], such as 1427 Clifton Street, N.W.,[79] 1429 Clifton Street, N.W.,[80] and 1329 Florida

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[74] T 100 (February 2, 2005, Casey); T 53 (February 7, 2005, Casey)

[75] T 83, 86 (February 2, 2005, Casey)

[76] D 5; "a little distant" Curry, T 40 (October 27, 2004; "too distant"

[77] T 49 (February 2, 2005)

[78] T 97 (February 7, 2005, Casey)

[79] D 22; T 114 (February 8, 2005, Debra Knight-Brown)

[80] D 23; T 114 (*February 8, 2005, Debra Knight-Brown)

Avenue, N.W., used in Mr. Casey's 2002 appraisal[81] as well as 1422 Belmont Road, N.W.[82]

40. Two of the experts agreed that tenders would not accept appraisals that are more than six months old,[83] and Mr. Kessler opined that comparables more than six months old should not be used in an appraisal.[84] All of them thought that in the market of 2002-03, use of a year old appraisal was not appropriate.[85]

41. Auldrey Glover sought to counter. these opinions by showing that the D.C. Assessor showed an increase in values that corresponded to the increase from the 2002 appraisal of $258,000 to the sales price of

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[81] T 114 (February 8, 2005, Debra Knight-Brown)

[82] T 114 (February 8, 2005, Debra Knight-Brown)

[83] T 16 (October 27, 2004, Curry); T 134 (February 2, 2005, Casey)

[84] T 35-36 (February 2, 2005)

[85] T 17-18 (October 27, 2004, Curry); T 57-58 (February 2, 2005); T 35-36 (February 7, 2005, Casey)

$300,000. The assessment card reflected these same figures,[86] such a coincidence that Mr. Casey said "... there's no way they could have had any knowledge of my report unless my client gave it to them."[87] But this ignores the fact that Auldrey Glover did not list the property at $300,000, she listed it at $258,000.[88] Mr. Kessler advised that if an old appraisal is to be used the listing price should be much higher.[89]

CONCLUSIONS OF LAW

1. A personal representative is under a general duty to settle and distribute the estate of the decedent in accordance with the laws of intestacy as expeditiously and efficiently as is prudent and consistent with the best interests of the persons interested in the estate. *D.C. Code§ 20-701(a).*

2. In view of the undisputed testimony of the appraisers that it was not prudent to fix the

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[86] D 8.

[87] T 9 (February 7, 2005)

[88] P. 27.

[89] T 56 (February 2, 2005)

listing price on the basis of an appraisal more than a year old, in a market that was rapidly increasing in the short term, the Court finds that Auldrey Glover breached her fiduciary duty to the beneficiaries of the Estate of Solomon Brown when she fixed the listing price at $258,000 in October 2003 based on the Casey appraisal as of September 16, 2002.

3. The Court notes that Auldrey Glover elected not to place the subject property on the multiple listing services, therefore the property never "hit the open market."[90] It is significant that in *In Re: Land,* INTVP 30-97 (Order of September 17, 2002) Judge Long saw a breach fiduciary duty where the fiduciary failed to get any exposure to the market. She had an appraisal and on that basis sold the shell property to her father in law. No broker was involved. In fact there was no one else to "test the market" for the price of the property.

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[90] T 54 (February 2, 2005)

There is, of course, no requirement that a fiduciary use a broker to affect a sale, but where no broker is used the prudent fiduciary should find some way of testing the market, perhaps by advertising.

4. In this case Auldrey Glover used a broker, however that broker was her own lawyer. Since that lawyer-broker was accepting the listing for a 3% commission[91] it is not to be wondered at that she did not want to place the property on the MLS because if she did not procure the sale she would be entitled to only 1½% commission. That was not a prudent way to market the property with a year old appraisal.

5. The conflict of interest arises because if Auldrey Glover had had an independent attorney she would have been told that the concession of commission to 3% was of no benefit to the estate unless the property was to

[91] P. 27

be marketed properly. Paying 6% on a significantly higher sales price nets the estate more than a 3% commission on a price made lower through poor marketing.

6. Even if Auldrey Glover could escape liability for using an out of date appraisal, she in effect mislead Mr. Homer Brown by representing to him on two occasions that she had was low based on her un-rebutted statements to Mr. Brown. Accordingly based on what she knew, the language about the market in the appraisal itself and testimony of the market conditions at the time of the sale, the Court finds that Auldrey Glover breached her duty to the beneficiaries of the estate by selling the subject property for $300,000.

7. The Court notes that even Auldrey Glover's appraiser put the value of the property at $360,000 in October 2003. Comparables adduced by Messrs. Curry and Kessler indicated a value more in line of $600,000.

The Court accordingly finds that reasonable market value to be $375,000.000.

8. A personal representative who breaches her duty to the estate may be deprived of compensation[92] and an attorney who has a manifest conflict of interest[93] may not be paid.[94]

9. Judgment shall be entered against Auldrey Glover and her surety for the difference between the price she obtained for the property and the reasonable market value in favor of the estate of Solomon Brown in the amount, that is $75,000.00.

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[92] *Estate of King, 769* A. 2d 771 (D.C. 2001)

[93] Rule 1.8(a), Rules of Professional Conduct prohibits a lawyer from entering into a business relationship with a client unless the transaction is fair, the client is advised of the right to seek independent counsel and the client has the opportunity to do so and provides written consent. *See D.C. Bar Op. No. 226 (1992)* broker and *Op. No. 306 (2001)* insurance.

[94] *See Estate of Corriea,* 719 A.2d 1234 (D.C. 1998)

10. Regarding the moving of the Piano, the Court is satisfied with assertion 'by Auldrey Glover that the Piano had no value and it was necessary to move it for presentation of the property. Accordingly, the estate shall be charged with the cost of moving the Piano.

11. The conflict of interest goes to the behavior and action of Ms. Smith. As a result the estate has been harmed, and the equitable sanction should clearly be imposed against Ms. Smith. Accordingly, the commission of $9,000.000 to Ms. Smith's company shall be disgorged from her business. Accordingly, the estate shall reduce the $9,000.00 fee from the funds that would be due to Ms. Smith.

12. Harm has also resulted to the estate as a result of costs generated this unnecessary litigation. While Ms. Glover may have proceeded with the sale of the property on the advise of counsel, she being the fiduciary, it was her violation to sell the property without

testing the market and without a timely appraisal. A reasonable sanction shall be that the estate shall not be charged for her fees and that of her fees and that of Ms. Smith regarding all time spent in this litigation, including the Petition to Ratify Sales of the property. Finally, Ms. Glover shall restate her first and final account to reflect the starting date of May 31, 1992, and to be consistent with these findings of fact and conclusions of law. Included in the restated account should be a credit for Ms. Glover for any real estate taxes for the subject property that she can demonstrate were paid from her personal funds. Said restated account to be filed no later than March 24, 2006.

It is so ORDERED this 22nd day of February 2006.

"s/

Jose M Lopez"

Copies to:

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Western Surety Company
P.O. Box 5077
Sioux Falls, SD 57117

Appendix E

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

In Re: Solomon Brown	:	
	:	ADM Number 1374-03
	:	

Washington, D.C.
September 24, 2004

The above-entitled action came on for a jury trial before the Honorable JOSE LOPEZ, Associate Judge, in courtroom number 215.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

NICHOLAS WARD, Esquire
LORENZO RANDALL, Esquire
MICHELLE SMITH, Esquire
Washington, D.C.

Deborah Armstrong (202) 879-1030
Official Court Reporter

Testimony.

THE COURT: You know, I would not prevent you from putting your witnesses on the stand. But I thought that the experience in the real estate industry is that the tax assessed value doesn't have a direct relationship to the market value. And if you disagree with that, that is fine.

MS. SMITH: I disagree. And I believe the tax assessment department would have a different view of that also. And with regard to what the actual value is that has to be filed with the court, I would like the Court to review the code. I think I have it. It's supposed to be the value at the date of death, is the value that is supposed to be filed with the court.

THE COURT: Yes. Like I said, and I said my initial comment to try to avoid a

lengthy hearing. I don't think the focus of this hearing is going to be the value of the property at the date of death. I think the focus of this hearing is going to be the market value of the property when it was sold.

I hop e you are not trying to tell me that if the value of a piece of property at the date of death is $100,000, that is the value we need to consider for purposes of determining whether you had a fair price when you sold it. Is that what you are trying to say?

MS. SMITH: Well, just taking the code exactly as it's stated, and the code specifies the value at the date of death, and I think that is the value that the Court has to recognize because that is the value that the Court says.

THE COURT: Do you have that section of the code that you are speaking about? Let me have a second. Now, this is D.C. code 20-712, subsection A says, The fair market value of each item listed in the inventory as the date of death of the decedent should be determined by an appraiser.

Is that not related to what value one is to assign to a piece of property for purposes of stating an inventory?

MS. SMITH: Yes.

THE COURT: It would seem that therefore it not necessarily has to mean that that is the fair market value by which one is to be guided when it's time to sell the property.

MS. SMITH: Well, Your Honor I think that has to be the value that one looks at when selling the property. It must be at least the value as of the date of death. Now, the date of death value –

THE COURT: Let me ask you this. Take a piece

she has indicated to me that because we are in a high state of emergency in the United States Government, this is a very difficult time for her to take off of work.

THE COURT: Then what we do is find a time that will be good for her. Tell me when, how far out do we need to go. But I'll tell you right now considering the time right now, it would be impossible to have an evidentiary hearing now and conclude it.

So we'll need to come back one way or the other. I was going to suggest some dates and we could – the most significant – start out with what may be convenient for your client and see if it's convenient for the others until we reach an agreement on something.

MS. SMITH: Is it possible that we present her testimony, her side of it today?

THE COURT: I think there is going to be an objection to that. If there is no objection, fine. I am not so sure you want to do that because they have the burden of proof, and you'll want to hear what they have to say before you want to put on your evidence.

MS. SMTIH: Okay.

THE COURT: Thank you. The closet, the nearest, the first day I have available, if that is good with your client, if not, I'll just keep going down the line, is Monday October 18.

Appendix F

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

In Re: Estate

Solomon Brown — Adm. No. 1374-03

Deceased

AFFIDAVIT OF AULDREY GLOVER

I, Auldrey Glover hereby state the following is true and correct under penalty of perjury:

1. I am the personal representative for the Estate of Solomon Brown.

2. I am over 18 years of age.

3. I reside at 2654 Bowen Rd. S.E., Washington, D.C. 20020.

4. I obtained an appraisal for 2020 15th St. N.W. upon the instructions of my attorney as soon as I decided to open probate and sell the house.

5. There was a delay in the time between when I got the appraisal and when I filed the petition because I had difficulty locating some of the heirs.

6. At the time I obtained the appraisal, I believed it was a true and accurate reflection of the values of the houses in the neighborhood.

7. When the petition was mailed to the heirs, each petition had a copy of the appraisal attached. No one complained to me at that time about the amount of the appraisal.

8. I did not know the buyer prior to the sale and met them for the first time at settlement.

9. Prior to signing the purchase agreement, I required them to provide proof of funds.

10. After I listed the house for sale and negotiated the offer, I had discussed the entire transactions with my brother Homer Brown and he was in agreement. He was very happy with the price that I got for the house.

11. I was very happy to get a purchaser quickly

because the house was a financial burden. Since it had been boarded up, I received approximately $700 in fines, one fine being waived after spending $14,000 to make repairs.

12. I I felt very good about the transaction because I felt that I had gotten more than fair market value.

Respectfully submitted,

/s/ Auldrey Glover

Subscribed and sworn before me on this _____ day of _____ 2004

Notary Public:

_____

My commission expires:

Appendix G

Greater Capital Area Association of REALTORS®, Inc.

EXCLUSIVE RIGHT TO SELL – LISTING AGREEMENT FOR IMPROVED REAL PROPERTY

Attach Jurisdictional Addendum and Required Disclosures

PROPERTY ADDRESS: 2020 15th Street, N.W.

CITY: Washington **STATE:** D.C.
DATE: 10-13- 03 **MULTIPLE LIST #:** _____

1. **SELLER (List all owners):** Estate of Solomon Brown c/o Auldrey Glover P.R.

Mailing address, if different: 2654 Bowen Road S.E. Washington, D.C. 20020

Office Telephone: 703-784-9321
Office/Home Fax:

Home Telephone: 202-678-3664 **Cell Phone(s):** 202-486-8717 **Email Address:**

_____

2. **BROKER:** Smart Choice Real Estate PLLC

Office Address: 433 Kennedy Street, N.W. #2 **Office Telephone:**

Office Fax: 202-723-5806

Listing Agent: Michael Lancaster Sr. **Direct Line:**

License # _____

Home Phone: 202-829-2826 **Cell Phone:** N/A

Email Address:

3. Purpose: This Agreement ("Agreement") between Seller and Broker grants to Broker the exclusive right to sell, exchange or convey the herein described property ("Property"), together with all improvements thereon and with all attached rights and easements, attached hereto, and known as Lot: 0049 Block/Square: 0189 Unit: N/A Section: _____ Tax ID # _

Parking Space(s) # Storage Unit(s) #

Subdivision/Project: N/A

under the terms and conditions set forth herein, Seller represents that the Parking Space(s) and/or Storage Unit(s) ☐ LISTING do(es) convey ☐ do(es) not convey.

4 LISTING PRICE: The Property is offered for sale at a listing price ("Listing Price") of **Two Hundred Fifty Eight Thousand Dollars** ($258,000) with minimum deposit of N/A % or such other price and deposit as is later agreed upon in writing.

5. LISTING PERIOD: This Agreement shall become effective on 10-13-03 and shall expire at midnight on 4-13-04 ("Listing Period") or such other date if so amended in writing. The listed Property shall be available for showing no later than 48 hours from the effective date hereof. If a sales contract is signed before this Agreement expires, providing for settlement beyond the Listing Period or any written extension thereof, the terms

hereof shall be extended automatically until final disposition of the sales contract.

6. Broker's Fee:

A. Fee: Seller agrees to pay to Broker 3% of the sale price or $ N/A (strike one) as broker's fee ("Broker's Fee") and acknowledges that Broker's Fee shall be earned and payable in the event that:

(1) Broker or its sales associates, other brokers or their sales associates, Seller or any other person, produces a ready, willing and able Buyer who presents an offer to purchase, exchange or convey the Property on the terms herein provided or at any price and terms acceptable to Seller during the Listing Period or any written extension thereof or;

(2) Seller enters into a sales contract with a buyer who was shown the Property by Seller, Broker, or its sales associates, other brokers or their sales associates, or any other person during the Listing Period or any written extension thereof. Further, such Broker's Fee shall be paid if the Property is sold, conveyed, or otherwise transferred within _____ days after the termination of this Agreement or any extension thereof (the "Protection Period") to anyone to whom the Property has been shown by Broker or anyone else, including

the Seller, prior to final termination of this Agreement unless a valid listing agreement is entered into during the term of said Protection Period with another licensed real estate broker.

B. Seller reserves the right, if said Property is not previously sold, to accept any offer in excess of the listed price.

C. Deferral: Broker agrees to defer receipt of Broker's Fee until settlement date solely as an accommodation to Seller, such deferral shall in no event be construed as a waiver of this earned fee, which is due and payable under the terms of this paragraph 6.

D. Cancellation: If Buyer, after contract acceptance, cancel the sale, fails to perform or is otherwise in default, the Broker's Fee is due only if and when Seller collects damages by suit, settlement, or forfeiture of deposit. In such case, Broker shall receive the lesser of one-half of the damages recovered or the Broker's Fee, but not to exceed the above Broker's Fee. If Seller, after contract acceptance, cancels the sale, fails to perform or otherwise is in default or the sales contract, the Broker's Fee is due in full no later than the agreed settlement date.

E. Broker's sole duty is to effect a sale of the Property.

7. AGENCY: Agency disclosure laws and types of representation vary in the State

of Maryland and District of Columbia. Options

include, but are not limited to, seller agency, buyer agency, sub-agency, intra-company agency, designated representation and dual agency. See Jurisdictional Addenda.

8.AUTHORIZATIONS:

A. Sign: Seller authorizes Broker to install a "For Sale" sign on the Property; in accordance with applicable zoning ordinance and community association regulations.

B. Marketing, Photography and Discrimination of Information: Seller authorizes Broker to market the Property in any medium selected by Broker including, but not limited to, a picture book, newspaper, periodical, MRIS, Internet, photo listing or pictorial display and any other similar or related use for marketing purposes. Seller authorizes Broker to disseminate information about the Property.

C. Key and KeyBox:

(1) Use: Seller authorizes Broker to allow key-entry showings and the installation of a KeyBox and the delivery of door access keys for use by the Greater capital Area Association of REALTORS®, Inc. ("GCAAR")

members and members of current REALTOR® Associations Signatory to the ELECTRONIC KEYBOX SERVICE AGREEMENT ("Authorized Users") to access the Property and to accompany prospective buyers, inspectors, appraisers exterminators and other parties necessary for showings and inspecting the Property. Affiliate members (i.e., inspectors, appraisers, estimators) may have access for its business purpose with permission of the Listing Agent.

(2) Leased Property: If the Property is under lease during the Listing Period, Seller will furnish Broker with a written authorization, signed by all lessees, authorizing the use of a KeyBox and/or keys.

(3) Private Insurance: Seller is advised to take all precautions for safekeeping of valuables and to maintain appropriate insurance through Seller's own insurance company.

(4) Liability: Seller agrees for itself, its heirs and assigns to completely indemnify, save and hold harmless said Broker, its agents, and its affiliated brokers, salespeople, cooperating brokers, subagents, affiliate members with key(s) and with KeyBox access and the Greater Capital Area Association of REALTORS®, Inc., form any and all claims, loss or liability arising from the use of said key(s) or Key Boxes, including Broker's

negligence, breach of contract or any wrongdoing exclusive of gross negligence or willful misconduct. Seller assumes all risk of any loss, damage and injury, except those caused by gross negligence or willful misconduct of any party.

D. Cooperation and Fee Sharing: Seller authorizes Broker to make the Property available to all brokers/agents, sub-agents or buyer agents, and to pay a portion of the Broker's Fee (paragraph 6.A.) as compensation to sub-agent brokers ("Cooperating Broker") or buyer-agent brokers ("Buyer Broker").

9. **INCLUSION/EXCLUSIONS:** Unless otherwise negotiated in the sales contract, the sales price shall include those items of personal property as described in the attached INCLUSIONS/EXCLUSIONS DISCLOSURE. It is recommended that this Disclosure be left at the Property for prospective buyers.

10. PROPERTY CONDITION AND DISCLOSURE OF MATERIAL FACTS:

A. Legal Requirement: Seller acknowledges that the Broker has informed Seller of Seller's applicable obligations, as defined in applicable forms attached hereto, to provide a Disclosure/Disclaimer Statement to prospective buyers. Certain classifications

of sellers are exempted from this requirement by law.

B. Indemnify: Seller agrees to indemnify and hold Broker harmless from all claims, disputes, litigation, judgments and attorney's fees arising from any incorrect information supplied by Seller or from Seller's failure to disclose any material facts.

C. Hazardous Materials and Conditions: There are environmental conditions and hazardous materials that could affect the Property and sale. Broker does not have the technical expertise to advise Seller of their presence. Seller may employ an expert to inspect for the same. In the event Seller conducts such tests and makes reports available to Broker, Seller authorizes Broker to make said reports available to prospective buyers.

D. Amend as Applicable: Seller agrees to amend in writing the applicable Disclosures if any material change affecting the Property occurs during the Listing Period.

11.LEAD PAINT REGULATIONS: SELLER REPRESENTS AND WARRANTS TO BUYER, BROKERS, BROKER'S AGENTS AND SUBAGENTS OF BROKERS, INTENDING THAT THEY RELY UPON SUCH WARRANTY AND REPRESENTATION, THAT THE

PROPERTY WAS ____x__ OR _____ WAS NOT CONSTRUCTED PRIOR TO 1978
(SELLER TO INITIAL) AG, P.R._____

IF SELLER IS UNABLE TO REPRESENT AND WARRANT THE AGE OF THE PROPERTY, SELLER AGREES TO COMPLY WITH THE REQUIREMENTS OF THE FEDERAL RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.
(SELLER TO INITIAL)_____N/A_____

FEDERAL LAW (TITLE X, SECTION 10108, THE RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992) REQUIRES THE DISCLOSURE OF CERTAIN INFORMATION REGARDING LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS. IN CONNECTION WITH THE SALE OF RESIDENTIAL REAL PROPERTY.

A SELLER WHO FAILS TO GIVE THE REQUIRED LEAD-BASED PAINT DISCLOSURE FORM AND EPA PAMPHLET.

ENTITLED "PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME" MAY BE LIABLE UNDER THE ACT FOR THREE TIMES THE AMOUNT OF DAMAGES AND MAY BE SUBJECT TO BOTH CIVIL AND CRIMINAL PENALTIES.

Seller and any agent involved in the transaction are required to retain a copy of the completed Federal Lead-Based Paint Disclosure Form for a period of three (3) years following the date of settlement.

12.TERMITE/WOOD-DESTROYING INSECTS: Seller agrees to provide access to the Property for an inspection to determine evidence of active infestation by termites and/or other wood-destroying insects. This inspection is in addition to the pre-settlement inspection and other inspections as agreed to in the sales contract. The inspection shall include the house, garage or other outbuildings and any fences abutting the house, as may be required by the sales contract. If infestation or damage exists, then prior to or at settlement, Seller agrees, at Sellers expense, to treat present

infestation and repair damage caused by present or prior infestation, in accordance with the terms of the sales contract (a copy of which has been given to the Seller) or lender requirements. In the event Seller accepts a contract that includes VA financing, Seller agrees to reimburse Buyer for the reasonable cost of said inspection.

13. ENCUMBRANCES/LIENS:

A. Clear Title: Seller warrants clear title and agrees to provide sufficient cash to discharge at settlement all liens and encumbrances including, but not limited to, existing deeds of trust, home equity loans, mechanic's liens, deferred transportation related facility charges/taxes, tax judgment liens, property taxes, Coop, Condo, HOA fees or any specific unit assessments. Seller shall comply with all orders, requirements, or notices of violations of any county or local authority, condominium unit owners' association, homeowner's or property owners' association or actions in any court on account thereof, against or affecting the Property on the date of settlement. Title is to be good and

marketable, and insurable by a licensed title insurance company with no additional risk premium. In case action is required to perfect the title, such action must be taken promptly by the Seller at the Sellers' expense. Seller shall convey the Property by special warranty deed. Seller shall sign such affidavits, lien waivers, tax certifications and other documents as may be required by the lender, title insurance company, Settlement Agent, or government authority, and authorizes the Settlement Agent to obtain pay-off or assumption information from any existing lender(s) and/or lien holder(s).

Liens: Seller disclosures to Broker the following existing liens/encumbrances against the Property and further agrees to disclose any new liens which arise during the Listing Period:

(1) First Trust Lender: _____

(2) Approx. Balance: $_____

Account#: _____ Address: _____

Telephone: _____

Second Trust/Home Equity Lender:_____

(3) Approx. Balance: $_____

(3)Other Lien Holders*:_____
Approx. Balance: $_____
Account#: _____ Address: _____
Telephone: _____
* Attach additional information as required.
C.Rights to Property: Seller warrants that the Property is not subject to any right to purchase, lease or acquisition by virtue of an existing option, right of first refusal or other agreement. Seller agrees not to negotiate new leases, or extend leases, during the Listing Period without prior written approval of Broker.
D. General Title Disclosures: Except as provided below, Seller has no knowledge of any pending matters that might give rise to problems with the sale of the Property including, but not limited to, divorce, estate, deceased co-owner, foreclosure, bankruptcy or other legal proceedings: _____.

14.OWNERSHIP WITH ASSESSMENTS:
☐ Condominium OR ☐ Cooperative OR ☐ Homeowners Association (HOA)
Name of Project/Subdivision: _____
Management Company: _____
Address:_____
Normal Assessment $_____
Additional/Special Assessment $

_____ Outstanding Balance $

_____

Seller agrees to abide by disclosure requirements of local statutes governing condominiums, cooperatives or homeowners associations by completing required disclosure addenda and by furnishing Buyer, at Seller's expense, a current "resale" certificate and pertinent documents, for the project/community in which Property is located.

15. SMOKE DETECTOR REQUIREMENTS: Seller acknowledges that he has been advised by REALTOR®, that smoke detectors are required in jurisdictions that have smoke detector ordinances and Seller shall have same installed and operational prior to settlement of any sale.

16. FAIR HOUSING LAWS: In compliance with federal fair housing regulations, the Property shall be made available to all persons without regard to race, color, religion, national origin, sex, physical or mental handicaps and familial status. Additional protected classes for the District of Columbia or the State of Maryland and the appropriate local jurisdictions are listed in the applicable jurisdictional addendum attached hereto.

17. CLOSING COSTS: Seller acknowledges that buyers have the right to select the title insurance company, settlement or escrow company or title attorney. Seller agrees to pay settlement costs including, but not limited to, the release of liens or encumbrances against the property, deed preparation, other legal document preparation, courier/delivery charges, reasonable settlement fee and, in addition, transfer and recordation taxes and any other costs agreed upon in the sales contract.

18. IRS: Section 1445 of the Internal Revenue Service (IRS) Code may require the settlement agent to report the gross sales price, Seller's federal tax identification number and other required information to the IRS. Seller will provide to the settlement agent such information at the time of settlement. In certain situations, the IRS requires a percentage (currently 10%) of the sales price to be withheld from Seller's proceeds if Seller is

a foreign person for purposes of U.S. income taxation. A foreign person includes, but is not limited to, non-resident aliens, foreign corporations, foreign partnerships, foreign trusts or foreign estates.
Seller represents that Seller is ☐ OR is not ☐ a foreign person for purposes of U.S. income taxation.

19. GENERAL PROVISIONS:

A. Laws and Regulations: Seller acknowledges that Broker and its sales associates are bound by and subject to the regulations of the multiple listing service to which the Broker subscribes. Broker must comply with federal, state and local laws and regulations as well as real estate licensing laws and regulations of either the District of Columbia or the State of Maryland.

B. Competing Properties: Seller understands that Broker may have or obtain listing of other similar properties and that potential buyers must consider, make offers on, or purchase through Broker properties before, during and after the expiration of this Agreement.

C. Subsequent Offers: Upon final ratification by the Seller of a contract of sale pursuant to this Listing Agreement, Broker shall have no further obligation hereunder to procure or

present to Seller any subsequent purchase offers.

D.Notice: Seller agrees that this Agreement and any modifications thereof shall only be in full force and effect when signed by both parties and received by Broker or by transmitting a fully executed copy to Broker, signed by all parties, via an electronic medium, which produces a tangible record of the signed transmission.

E.Paragraph Headings: The Paragraph headings in this Agreement are for reference and convenience only, and do not define or limit the intent, rights or obligations of the parties.

F.Gender: Wherever the context so requires, the singular numbers shall include the plural, the plural the singular, and the use of either gender shall include the other gender.

G."Buyer" means "purchase" and vice versa.

H.Sample Contract: Seller acknowledges receipt of current residential contract of sale or regional sales contract form.

20.AUTHORITY TO DISCLOSE EXISTING OFFERS: Owner is advised that prospective buyers or cooperating brokers may inquire of Broker or Broker's agents as to whether existing written offers have been received for the purchase of the Property. The disclosure of the existence of written

offers could be either beneficial or detrimental to Owner. On the one hand, such disclosure could result in the interested buyer making the highest and best offer as promptly as possible. On the other hand, such disclosure could result in the interested buyer electing not to make an offer.

Owner hereby: (Owner initial the appropriate line)

G_____ Authorizes; OR

_____ Does Not Authorize

Broker or Broker's agents to disclose existing offers on the Property in response to inquiries from buyers or cooperating brokers.

21.ADDITIONAL TERMS: Seller Does Not Want Agent to Enter Listing in MLS

22.OWNERSHIP:

Seller represents that no other person or entities own any portion of the Property or have any ownership rights to the Property.

23. ENTIRE AGREEMENT OF PRINCIPALS:

A. This Agreement contains the entire listing agreement between Seller and Broker. Any prior discussions and agreements between the parties concerning

this subject matter are suspended by this Agreement.

B. Seller acknowledges that he has read and understands the Agreement, that is a legally binding contract, that he may seek legal advice prior to signing it and that all information provided to Broker by Seller is true and correct to the best of Seller's knowledge.

B. SELLER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS LEGALLY BINDING AGREEMENT AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

/s/ Auldrey Glover	/s/ Smart Choice Real Estate, /s/ Michelle Smith
Seller/Owner (indicate if sole owner)	Broker
Date 10/13/03	Michael Lancaster
	Listing Agent
	10/13/03
	Date

	Listing Agent
	10/13/03
	Date

Seller/Owner	Listing Agent
	Date

* If signing for any other owner of Property, attach Power of Attorney.